(18,878.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 247.

RICHARD C. CRAWFORD AND EDWARD A. VALENTINE, PLAINTIFFS IN ERROR,

vs.

JOHN E. BURKE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print
Citation	*a*	1
Proof of service of citation	*b*	1
Clerk's certificate as to citation	*c*	2
Writ of error	*d*	2
Clerk's certificate as to writ of error	*f*	3
Clerk's certificate and return to writ of error	*g*	4
Caption	1	4
Transcript from circuit court of Cook county	2	5
Summons and return	3	5
Præcipe for summons	5	6
Declaration	7	7
Plea of Valentine	44	23
Plea of Crawford	46	24
Appearance for plaintiff	48	24
Replication to plea of Valentine	50	25
Replication to plea of Crawford	51	25
Notice as to Valentine's evidence	53	26
Notice as to Crawford's evidence	55	27
Stipulation waiving jury, &c.	58	28
Stipulation to set case	60	28

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 19, 1903.

	Original.	Print
Stipulation to set case	62	29
Special plea of Crawford	64	29
Special plea of Valentine	66	31
Replication to plea of Crawford	69	32
Replication to plea of Valentine	70	33
Judgment	71	34
Allowance of appeal to appellate court	71	34
Order granting leave to file notice of special matter of defense	72	34
Order extending time to file exceptions	73	34
Order submitting cause without jury	73	35
Order granting leave to file special pleas	74	35
Stipulation to send up original bill of exceptions	76	35
Bill of exceptions	77	36
Colloquy between court and counsel	78	36
Testimony of John E. Burke	79	37
Exhibit 1—Monthly statements	103	49
Testimony of Robert C. Drayton	173	85
Evans R. Dick	219	107
Exhibit M—Letter, Dick Bros. & Co. to Crawford & Valentine, July 2, 1894	245	118
N—Letter, Dick Bros. & Co. to Crawford & Valentine, January 10, 1895	246	119
O—Letter, Dick Bros. & Co. to Crawford & Valentine, January 11, 1895	247	119
P—Letter, Dick Bros. & Co. to Crawford & Valentine, January 25, 1895	248	120
Q—Letter, Dick Bros. & Co. to Crawford & Valentine, January 26, 1895	249	121
R—Letter, Dick Bros. & Co. to Crawford & Valentine, January 28, 1895	249	121
S—Letter, Dick Bros. & Co. to Crawford & Valentine, February 2, 1895	250	122
T—Letter, Dick Bros. & Co. to Crawford & Valentine, March 28, 1895	251	122
U—Letter, Dick Bros. & Co. to Crawford & Valentine, January 28, 1895	251	123
V—Letter, Dick Bros. & Co. to Crawford & Valentine, March 28, 1895	252	123
W—Letter, Dick Bros. & Co. to Crawford & Valentine, April 11, 1895	253	124
X—Letter, Dick Bros. & Co. to Crawford & Valentine, February 4, 1895	254	124
Y—Letter, Dick Bros. & Co. to Crawford & Valentine, April 1, 1895	256	125
Plaintiff's Exhibit A—Statement of account, Burke with Crawford & Valentine	318	155
B—Statement of account, Toland & Co. with Crawford & Valentine	318	155
C—Statement of account, Toland & Co. with Crawford & Valentine	318	156
D—Statement of account, Toland & Co. with Crawford & Valentine	318	156

	Original.	Print
Correspondence between Crawford & Valentine and Toland Bros. & Co	319	157
Plaintiff's Exhibit L—Statement of account, Crawford & Valentine with Dick Bros. & Co..	320	159
Testimony of John E. Burke (recalled)	321	162
Wm. C. Niblack	341	172
Ernest Rickett	352	179
William Kent	371	189
Colloquy between court and counsel	389	202
Testimony of John E. Burke (recalled)	393	204
Statement of market prices	396	205
Testimony of Charles L. Boyd	397	206
Charles M. Walker	406	211
Petition in bankruptcy of Crawford & Valentine	410	213
Schedule A—Statement of debts, &c	413	215
B—Statement of property	421	216
C—Creditors of Crawford	429	218
D—Property of Crawford	431	219
E—Debts of Valentine	434	221
F—Property of Valentine	440	222
Bill of complaint in Valentine *vs.* Crawford	448	225
Order appointing receiver in Valentine *vs.* Crawford	454	228
Assignment of Crawford & Valentine to Trust Co	455	229
Testimony of Richard C. Crawford	457	230
Defendant's Exhibit 1—Certificate of discharge in bankruptcy	463	232
Testimony of John E. Burke (recalled)	464	233
Colloquy between court and counsel	467	234
Agreement as to market prices	468	235
Ledger of Crawford & Valentine showing account of Burke	469	235
Ledger of Crawford & Valentine showing account of R. C. Crawford (omitted in printing)	471	—
Ledger of Crawford & Valentine showing account of Dick Bros. & Co	546	235
Ledger of Crawford & Valentine showing account of Toland Bros. & Co	548	235
Bills payable, &c. (omitted in printing)	549	—
Plaintiff's propositions of law	568	236
Defendant's propositions of law	578	242
Decision	582	245
Colloquy between court and counsel, &c	583	245
Judge's certificate to bill of exceptions	587	248
Bond on appeal to appellate court	588	248
Clerk's certificate	589	249
Assignment of errors by Crawford & Valentine	590	249
Assignment of errors by Burke	592	250
Certificate of clerk of appellate court	593	251
Caption in appellate court	594	252
Order extending time to file briefs	595	252
Order extending time to file briefs	596	252
Order extending time to file briefs	597	253

	Original.	Print
Order extending time to file briefs	598	253
Order taking cause under advisement	599	253
Order granting leave to cite additional authorities	600	253
Judgment of appellate court	601	254
Order allowing appeal to supreme court of Illinois	602	254
Order approving appeal bond	603	255
Appeal bond	604	255
Certificate of clerk of appellate court	606	256
Assignment of errors of Crawford & Valentine	607	256
Assignment of errors of Burke	613	259
Additional assignment of errors of Burke	614	259
Order taking cause under advisement	615	260
Judgment	616	261
Petition for writ of error	618	261
Opinion	624	265
Order allowing writ of error	633	271
Bond on writ of error	634	272
Assignment of errors	636	273
Statement of errors and designation by plaintiffs in error of parts of record to be printed	642	276

a UNITED STATES OF AMERICA, ss:

To John E. Burke, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Illinois wherein Richard C. Crawford and Edward A. Valentine are plaintiffs in error and you are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done for the parties in that behalf.

Witness the Honorable Benjamin D. Magruder, chief justice of the supreme court of the State of Illinois, on March 2", 1903.

BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of the State of Illinois.

b STATE OF ILLINOIS, } ss:
County of Cook, }

On this 9th day of March, in the year of our Lord one thousand nine hundred and three, personally appeared before me the subscriber, D. A. Fraley, and makes oath that he delivered a true copy of the within citation to John E. Burke on the 5th day of March, A. D. 1903.

D. A. FRALEY.

Sworn to and subscribed to the 9th day of March, A. D. 1903.

[Seal of George Q. Allen, Notary Public, Cook County, Ills.]

GEORGE Q. ALLEN,
Notary Public, # 550, *Monadnock Building, Chicago, Ills.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

I have served this writ within my district by reading the same to and within the presence and hearing of John E. Burke, on March 5th, 1903, and at the same time delivering to him personally a true copy thereof.

JOHN C. AMES,
U. S. Marshal,
By D. A. FRALEY, *Dep'ty.*

Service	2.00
8 miles	48
	$2.48

c In the Supreme Court of Illinois.

RICHARD C. CRAWFORD and Edward A. Valentine *vs.* JOHN E. BURKE.	2689.	Appeal from Appellate Court of Illinois, First District.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the tenth day of March in the year of our Lord one thousand nine hundred and three, a copy of the foregoing citation, and return, was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said court, this twelfth day of March, A. D. 1903.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

d UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Illinois before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Richard C. Crawford and Edward A. Valentine, appellants in said supreme court of Illinois, and John E. Burke, appellee in said court,—(the said appeal in the supreme court of Illinois being from the appellate court of the first district of Illinois,—in a cause in which in said appellate court Richard C. Crawford and Edward A. Valentine were appellants and John E. Burke was appellee, and said appeal in said appellate court of the first district of Illinois being from the circuit court of Cook county, Illinois, in a suit in which John E. Burke was plaintiff and Richard C. Crawford & Edward A. Valentine were defendants) wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Con-
e stitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said

Richard C. Crawford and Edward A. Valentine, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of March, in the year of our Lord one thousand nine hundred and three.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
Clerk of the Circuit Court of the United States for the Northern District of Illinois, Seventh Circuit.

Allowed to operate as a supersedeas.

BENJ. D. MAGRUDER,
Chief Justice of the Supreme Court of Illinois.

f

In the Supreme Court of Illinois.

RICHARD C. CRAWFORD and EDWARD A. Valentine *vs.* JOHN E. BURKE.	2689. Appeal from Appellate Court of Illinois, First District.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the fourth day of March in the year of our Lord one thousand nine hundred and three, a copy of the foregoing writ of error for the defendants in error, was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said court, this twelfth day of March, A. D. 1903.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

g In the Supreme Court of Illinois.

RICHARD C. CRAWFORD and EDWARD A. Valentine vs. JOHN E. BURKE.	No. 2689. Appeal from Appellate Court of Illinois, First District.

I, Christopher Mamer, clerk of the supreme court and keeper of the records and files thereof, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages numbered from one (1) to six hundred and thirty-five (635) inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled, and of the whole thereof, as the same remain of record and on file in my said office, and that the succeeding pages numbered from six hundred and thirty-six (636) to six hundred and forty-one (641) inclusive, are an original assignment of errors likewise filed in my said office and which form a part of the transcript of the record; also I certify that the pages from six hundred and twenty-four (624) to six hundred and thirty-two (632) inclusive, which are included in the petition for the writ of error made to the chief justice of the supreme court of Illinois as Exhibit 1 to said petition, are a copy of the opinion of the supreme court of Illinois filed in said cause of Richard C. Crawford, *et al.* vs. John E. Burke.

In testimony whereof, I hereby set my hand and cause the seal of said supreme court of Illinois to be hereunto affixed, at Springfield, this twelfth day of March in the year of our Lord one thousand nine hundred and three.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

1 At a supreme court, begun and held at Springfield on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and two, within and for the State of Illinois,

Present: Benjamin D. Magruder, chief justice. Jacob W. Wilkin, justice, James H. Cartwright, justice, John P. Hand, justice, Joseph N. Carter, justice, Carroll C. Boggs, justice, James B. Ricks, justice, Howland J. Hamlin, attorney general. Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, that heretofore to-wit on the eighteenth day of September, A. D. 1902, there was filed in the office of the clerk of said court, a certain transcript of the record and proceedings of the circuit court of Cook county and of the appellate court of Illinois, first district, which said transcripts are in the words and figures following, viz:

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the Honorable E. F. Dunn, one of the judges of the circuit court of Cook county, at a term thereof begun and held in the court house, at Chicago, in said county and State, on the third Monday (being the 21st day) of January, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

Present: Honorable E. F. Dunn, one of the judges of the circuit court of Cook county, State of Illinois. Chas. S. Deneen, State's attorney Ernest J. Magerstadt, sheriff

Attest: JOHN A. COOKE, *Clerk.*

Be it remembered that heretofore, to-wit:—on the 30th day of July, A. D. 1897, a certain people's writ of summons was issued out of the office of the clerk of said court and under the seal thereof directed to the sheriff of Cook county to execute which writ together with the return of the sheriff thereon endorsed are in words and figures following, to-wit:—

 Copy.

STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Richard C. Crawford and Edward A. Valentine if they shall be found in your county, personally to be and to appear before the circuit court of Cook county, on the first day of the term thereof, to be holden at the court house, in the city of Chicago, in said Cook county, on the third Monday of September, 1897, to answer unto John E. Burke in a plea of trespass on the case to the damage of said plaintiff, as it is said, in the sum of thirty thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John A. Cooke, clerk of our said court, and the seal thereof, at Chicago, aforesaid, this 30th day of July, A. D. 1897.

[SEAL.] JOHN A. COOKE, *Clerk.*

(Endorsed across back as follows:

Served this writ on the within named defendant Richard C. Crawford, by reading the same to him this 30th day of July 1897, also

served this writ on the within named defendant Edward A. Valentine, by reading the same to him this 5th day of August 1897. James Pease, sheriff, by H. G. Hall, deputy.

Filed Aug. 18 1897

JOHN A. COOKE, *Clerk.*

4 And thereupon on the same day, to-wit;—on the 30th day of July A. D. 1897 a certain præcipe was filed in the office of the clerk of said court, in words and figures following, to-wit:—

5 STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court of Cook County, to the September Term, A. D. 1897.

JOHN E. BURKE, Plaintiff,
vs.
RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Defendants. } Case.

Damages, $30,000.

The clerk of said court will issue a summons in the above entitled cause to said defendant in a plea of trespass on the case to the damage of said plaintiff in the sum of thirty thousand dollars, direct the same to the sheriff of Cook county to execute and make it returnable to the September term of said court A. D. 1897.

JOHN E. BURKE,
Plaintiff and Attorney pro Se.

Chicago, July 30th, 1897.

To John A. Cooke, Esq., clerk.

Filed July 30, 1897.

JOHN A. COOKE, *Clerk.*

6 And afterwards, to-wit, on the 10th day of September, A. D. 1897 a certain declaration was filed in the office of the clerk of said court, in words and figures following to wit.

7 Copy.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD and EDWARD A. Valentine. } Case. Gen. No. 173,384.

John E. Burke, plaintiff, complains of the said Richard C. Crawford, and Edward A. Valentine, defendants, of a plea of trespass on the case: for that whereas, heretofore, to wit, on and prior to the 29th day of June, 1894, at the city of Chicago, county of Cook and State of Illinois, one Charles P. McAvoy and one Edward A. Valentine, were stockbrokers and copartners doing business as stockbrokers, under the firm name of Valentine and McAvoy, and whereas, heretofore, to wit: on the 29th day of June, 1894, the said Valentine and McAvoy, as the brokers and agents of the said plaintiff, were holding and carrying, for and on account of the said plaintiff, four hundred and fifty shares of the capital stock of the Metropolitan Traction Company, subject to the orders of the said plaintiff, which said shares of stock the said Valentine and McAvoy, as the brokers and agents of the said plaintiff had, prior to said last mentioned date, purchased for and on account of the said plaintiff, and at his request; and whereas, heretofore, to wit: on the 30th day of

8 June 1894, at the city of Chicago, county aforesaid, the said Richard C. Crawford and Edward A. Valentine, defendants, were stockbrokers and were then and there copartners doing business as stockbrokers, and dealers in investment securities, under the firm name of Crawford and Valentine; and whereas, before and at the time of the committing of the grievances by the said defendants, as hereinafter mentioned, the said plaintiff, at the special instance and request of the said defendants, had retained and employed the said defendants, as the brokers and agents of the said plaintiff, to buy, hold and carry stocks for and on account of the said plaintiff and subject to said plaintiff's orders, for reward to said defendants, in that behalf, and the said defendants then and there accepted and entered upon said retainer and employment, to wit, at the city and county aforesaid; and thereupon heretofore, to wit, on the 30th day of June, 1894, the said plaintiff, at the special instance and request of the said defendants, caused the said four hundred and fifty shares of the capital stock of the Metropolitan Traction Company of the said plaintiff, of great value, to wit, of the value of sixty-three thousand dollars ($63000.), and purchased as aforesaid by the said Valentine and McAvoy, as the brokers and agents of the said plaintiff, to be turned over, transferred and delivered to and placed under

the control of the said defendants to be held by said defendants, as a pledge for the amount due from plaintiff on said stock, and
9 to be carried and kept on hand by the said defendants, as the brokers and agents of the said plaintiff, for and on account of the said plaintiff, and subject to the orders of the said plaintiff, for reward to the said defendants in that behalf, and the said defendants then and there accepted and received the said four hundred and fifty shares of stock for the purpose aforesaid; and thereupon, it became and was the duty of the said defendants, as such brokers and agents of said plaintiff, and as such pledgees, to hold, as a pledge, and carry and keep on hand, the said four hundred and fifty shares of stock for and on account of the said plaintiff and subject to the said plaintiff's orders. And the said plaintiff further saith that heretofore, to wit; on the 28th day of September 1894, the said defendants, as the brokers and agents of the said plaintiff, and at the said plaintiff's request, purchased for and on account of the said plaintiff other and further shares of the capital stock of the Metropolitan Traction Company, to wit, fifty shares of said stock, property of the plaintiff, of great value, to wit, of the value of seven thousand dollars, to be held as a pledge by said defendants and to be carried and kept on hand by the said defendants, as the brokers and agents of the said plaintiff, and for and on account of said plaintiff, and subject to the orders of the said plaintiff, for commission and reward to the said defendants in that behalf; and the said defendants heretofore, to wit, on the day and year last aforesaid, had and re-
10 ceived the said fifty shares of stock for the purpose aforesaid; and thereupon it became and was the duty of the said defendants, as such pledgees, and as the brokers and agents of the said plaintiff, to hold as a pledge, and to keep on hand and carry the said fifty shares of stock for and on account of the said plaintiff, and subject to the orders of the said plaintiff, the total amount of the capital stock of the Metropolitan Traction Company then and there held and carried as aforesaid, by the said defendants, as aforesaid, for and on account of the said plaintiff, being five hundred shares; yet, the said defendants, not regarding their duty in that behalf, but contriving and intending to injure and defraud the said plaintiff in this behalf, afterwards, to wit, on the 24th day of October, 1894, wrongfully, wilfully and fraudulently, and without the knowledge or consent of the said plaintiff, and without any notice to him whatever, sold, delivered and disposed of a portion of said five hundred shares of stock, to wit, one hundred shares of the capital stock of the Metropolitan Traction Company, property of the said plaintiff, of great value, to wit, of the value of fourteen thousand dollars, and on the day and year last aforesaid. willfully and fraudulently converted the said one hundred shares of stock and the proceeds of the sale thereof and plaintiff's reversionary interest in said stock to their own use, by means whereof the said one hundred shares of stock and the proceeds of the sale thereof, and

plaintiff's reversionary — in said stock, were wholly lost to
11 the said plaintiff.

2. And whereas, also, heretofore, to wit, on and prior to the 29th day of June, 1894, at the city of Chicago, county of Cook and State of Illinois, one Charles P. McAvoy and one Edward A. Valentine were stockbrokers and copartners doing business as stockbrokers, under the firm name of Valentine & McAvoy, and whereas heretofore, to wit, on the 29th day of June, 1894, the said Valentine & McAvoy, as the brokers and agents of the said plaintiff, were holding and carrying, for and on account of the said plaintiff, four hundred and fifty shares of the capital stock of the Metropolitan Traction Company, subject to the orders of the said plaintiff, which said shares of stock the said Valentine and McAvoy, as the brokers and agents of the said plaintiff, had, prior, to said last mentioned date, purchased for and on account of the said plaintiff, and at his request; and whereas, heretofore, to wit, on the 30th day of June, 1894, at the city of Chicago, county aforesaid, the said Richard C. Crawford and Edward A. Valentine, defendants, were stockbrokers and were then and there copartners doing business as stockbrokers, and dealers in investment securities, under the firm name of Crawford and Valentine; and whereas, before and at the time of the committing of the grievances by the said defendants, as hereinafter mentioned, the said plaintiff, at the special instance and request of the said defendants, had retained and employed the said
12 defendants as the brokers and agents of the said plaintiff, to buy, hold and carry stocks for and on account of said plaintiff and subject to said plaintiff's orders, for reward to said defendants in that behalf, and the said defendants then and there accepted and entered upon such retainer and employment to wit, at the city and county aforesaid; and thereupon heretofore, to wit, on the 30th day of June, 1894, the said plaintiff at the special instance and request of the said defendants, caused the said four hundred and fifty shares of the capital stock of the Metropolitan Traction Company, of the said plaintiff, of great value, to wit; of the value of sixty-three thousand dollars, and purchased as aforesaid by the said Valentine and McAvoy, as the brokers and agents of the said plaintiff, to be turned over, transferred and delivered to and placed under the control of the said defendants to be held by the said defendants as a pledge for the amount due from plaintiff on said stock, and to be carried and kept on hand by the said defendants as the brokers and agents of the said plaintiff for and on account of the said plaintiff, and subject to the orders of the said plaintiff for reward to the said defendants in that behalf, and the said defendants then and there accepted and received the said four hundred and fifty shares of stock for the purpose aforesaid; and thereupon it became and was the duty of the said defendants as such brokers and agents of said plaintiff, and as such pledgees, to hold, as a pledge, and carry and

keep on hand the said four hundred and fifty shares of stock
13 for and on account of the said plaintiff, and subject to the said plaintiff's orders. And the said plaintiff further saith that heretofore, to wit, on the 28th day of September 1894, the said defendants, as the brokers and agents of the said plaintiff, and at the said plaintiff's request, purchased for and on account of the said plaintiff, other and further shares of the capital stock of the Metropolitan Traction Company, to wit, fifty shares of said stock, property of plaintiff, of great value, to wit, of the value of seven thousand dollars, to be held as a pledge by said defendants, and to be carried and kept on hand by the said defendants, as the brokers and agents of the said plaintiff, and for and on account of said plaintiff, and subject to the orders of the said plaintiff, for commission and reward to the said defendants in that behalf; and the said defendants heretofore, to wit, on the day and year last aforesaid, had and received the said fifty shares of stock for the purpose aforesaid; and thereupon it became and was the duty of the said defendants, as such pledgees, and as the brokers and agents of the said plaintiff, to hold as a pledge and to keep on hand and carry the said fifty shares of stock for and on account of the said plaintiff, and subject to the orders of the said plaintiff; yet, the said defendants, not regarding their duty in that behalf, but contriving and intending to injure and defraud the said plaintiff in this behalf, afterwards, to wit, on the tenth day of January, 1895, wrongfully, willfully and fraudulently, and without the knowledge or consent of the said plaintiff, and without any notice to him whatever, sold
14 delivered and disposed of another portion of said five hundred shares of stock, to wit, two hundred shares of the capital stock of the Metropolitan Traction Company, property of the plaintiff, of great value, to wit, of the value of twenty-eight thousand dollars, and then and there willfully and fraudulently and with intent to cheat and defraud the said plaintiff, converted the said two hundred shares of stock and the proceeds of the sale thereof and plaintiff's reversionary interest in said stock to their own use; by means whereof the said two hundred shares of stock, and the proceeds of the sale thereof, and plaintiff's reversionary interest in said stock were wholly lost to the said plaintiff;

3. And whereas also, heretofore to wit, on and prior to the 29th day of June, 1894, at the city of Chicago, county of Cook and State of Illinois, one Charles P. McAvoy and one Edward A. Valentine, were stockbrokers and copartners doing business as stockbrokers, under the firm name of Valentine & McAvoy; and whereas, heretofore, to wit, on the 29th day of June, 1894, the said Valentine and McAvoy, as the brokers and agents of the said plaintiff, were holding and carrying, for and on account of the said plaintiff, four hundred and fifty shares of the capital stock of the Metropolitan Traction Company, subject to the orders of the said plaintiff, which said shares of stock the said Valentine and McAvoy as the brokers and agents of the said plaintiff, had, prior to said

last mentioned date, purchased for and on account of the
15 said plaintiff, and at his request; and whereas, heretofore, to wit, on the 30th day of June, 1894, at the city of Chicago, county aforesaid, the said Richard C. Crawford and Edward A. Valentine, defendants, were stockbrokers and were then and there copartners doing business as stockbrokers and dealers in investment securities under the firm name of Crawford and Valentine; and whereas, before and at the time of the committing of the grievances by the said defendants, as hereinafter mentioned, the said plaintiff, at the special instance and request of the said defendants, had retained and employed the said defendants, as the brokers and agents of the said plaintiff to buy, hold and carry stocks for and on account of said plaintiff and subject to said plaintiff's orders, for reward to said defendants in that behalf; and the said defendants then and there accepted and entered upon such retainer and employment, to wit, at the city and county aforesaid; and thereupon, heretofore, to wit: on the 30th day of June, 1894, the said plaintiff, at the special instance and request of the said defendants, caused the said four hundred and fifty shares of the capital stock of the Metropolitan Traction Company, of the said plaintiff, of great value, to wit, of the value of sixty-three thousand dollars, and purchased as aforesaid, by the said Valentine & McAvoy, as the brokers and agents of the said plaintiff, to be turned over transferred and delivered to and placed under the control of the said defendants to be held by
said defendants as a pledge for the amount due from plain-
16 tiff on said stock, and to be hald, carried, and kept on hand by the said defendants, as the brokers and agents of the said plaintiff, for and on account of the said plaintiff, and subject to the orders of the said plaintiff, for reward to the said defendants in that behalf, and the said defendants then and there accepted and received the said four hundred and fifty shares of stock for the purpose aforesaid; and thereupon it became and was the duty of the said defendants, as such brokers and agents of said plaintiff, and as such pledgees, to hold as a pledge, and carry and keep on hand the said four hundred and fifty shares of stock for and on account of the said plaintiff, and subject to the said plaintiff's orders. And the said plaintiff further saith that heretofore, to wit, on the 28th day of September 1894, the said defendants, as the brokers and agents of the said plaintiff, and at the said plaintiff's request, purchased for and on account of the said plaintiff, other and further shares of the capital stock of the Metropolitan Traction Company, to wit, fifty shares of said stock, property of plaintiff, of great value, to wit, of the value of seven thousand dollars, to be held as a pledge by said defendants and to be carried and kept on hand by the said defendants, as the brokers and agents of the said plaintiff and for and on account of said plaintiff, and subject to the orders of the said plaintiff, for commission and reward to the said defendants in that behalf; and the said defendants heretofore, to wit, on the day
17 and year last aforesaid, had and received the said fifty shares of stock for the purpose aforesaid, and thereupon it became

and was the duty of the said defendants, as such pledgees, and as the brokers and agents of the said plaintiff, to hold as a pledge, and to keep on hand and carry the said fifty shares of stock for and on account of the said plaintiff, and subject to the orders of the said plaintiff; yet, the said defendants, not regarding their duty in that behalf, but contriving and intending to injure and defraud the said plaintiff in this behalf, afterwards, to wit, on the eleventh day of January, 1895, wrongfully, wilfully, and fraudulently, and without the knowledge or consent of the said plaintiff, and without any notice to him whatever, sold, delivered and disposed of another portion of said five hundred shares of stock, to wit, two hundred shares of the capital stock of the Metropolitan Traction Company, property of the plaintiff, of great value, to wit, of the value of twenty-eight thousand dollars, and then and there wilfully and fraudulently and with intent to cheat and defraud the said plaintiff, converted the said two hundred shares of stock and the proceeds of the sale thereof, and plaintiff's reversionary interest in said stock, to their own use; by means whereof, the said two hundred shares of stock and the proceeds of the sale thereof, and plaintiff's reversionary interest in said stock, were wholly lost to the said plaintiff;

4. And whereas, also, heretofore, to wit: on and prior to the
18 29th day of June, 1894, at the city of Chicago, county of Cook and State of Illinois, one Charles P. McAvoy and one Edward A. Valentine, were stockbrokers and copartners doing business as stockbrokers under the firm name of Valentine & McAvoy; and whereas, heretofore, to wit, on the 29th day of June 1894, the said Valentine and McAvoy, as the brokers and agents of the said plaintiff were holding and carrying for and on account of the said plaintiff, four hundred and fifty shares of the capital stock of the Metropolitan Traction Company, subject to the orders of the said plaintiff, which said shares of stock the said Valentine and McAvoy, as the brokers and agents of the said plaintiff, had, prior, to said last mentioned date, purchased for and on account of the said plaintiff, and at his request; and whereas, heretofore, to wit, on the 30th day of June, 1894, at the city of Chicago, county aforesaid, the said Richard C. Crawford and Edward A. Valentine, defendants, were stockbrokers and were then and there copartners doing business as stockbrokers, and dealers in investment securities, under the firm name of Crawford & Valentine; and whereas, before and at the time of the committing of the grievances by the said defendants, as hereinafter mentioned, the said plaintiff, at the special instance and request of the said defendants, had retained and employed the said defendants, as the brokers and agents of the said plaintiff, to buy, hold and carry stocks for and on account of said plaintiff and subject to said plaintiff's orders, for reward to said defendants in
19 that behalf, and the said defendants then and there accepted and entered upon such retainer and employment, to wit, at the city and county aforesaid; and thereupon, heretofore, to wit, on the 30th day of June, 1894, the said plaintiff at the special instance and request of the said defendants, caused the said four hundred

and fifty shares of the capital stock of the Metropolitan Traction Company, of the said plaintiff, of great value, to wit, of the value of sixty-three thousand dollars and purchased, as aforesaid, by the said Valentine and McAvoy, as the brokers and agents of the said plaintiff, to be turned over, transferred and delivered to and placed under the control of the said defendants, to be held by said defendants, as a pledge for the amount due from plaintiff on said stock, and to be carried and kept on hand by the said defendants as the brokers and agents of the said plaintiff for and on account of the said plaintiff, and subject to the orders of the said plaintiff, for reward to the said defendants in that behalf, and the said defendants there and then accepted and received the said four hundred and fifty shares of stock for the purpose aforesaid; and thereupon it was and became the duty of the said defendants, as such brokers and agents of said plaintiff, and as such pledgees, to hold as a pledge, and carry and keep in hand the said four hundred and fifty shares of stock for and on account of the said plaintiff, and subject to the said plaintiff's orders. And the said plaintiff further saith that heretofore, to wit,
20 on the 28th day of September, 1894, the said defendants, as the brokers and agents of the said plaintiff, and at the said plaintiff's request, purchased for and on account of the said plaintiff, other and further shares of the capital stock of the Metropolitan Traction Company, to wit, fifty shares of said stock, property of plaintiff, of great value, to wit, of the value of seven thousand dollars, to be held as a pledge by said defendants and to be carried and kept on hand by the said defendants, as the brokers and agents of the said plaintiff, and for and on account of said plaintiff, and subject to the orders of the said plaintiff, for commission and reward to the said defendants in that behalf; and the said defendants heretofore to wit, on the day and year last aforesaid, had and received the said fifty shares of stock for the purpose aforesaid; and thereupon it became and was the duty of the said defendants, as such pledgees, and as the brokers and agents of the said plaintiff, to hold as a pledge and to keep on hand and carry the said fifty shares of stock for and on account of the said plaintiff, and subject to the orders of the said plaintiff; And the said plaintiff further saith that heretofore, to wit, on the 28th day of March, 1895, the said defendants, as the brokers and agents of the said plaintiff, and at the said plaintiff's request, purchased for and on account of the said plaintiff, other and further shares of the capital stock of the Metropolitan Traction Company, to wit, fifty shares of said stock, property
21 of plaintiff, of great value, to wit, of the value of seven-thousand dollars, to be held as a pledge by said defendants and to be carried and kept on hand by the said defendants as the brokers and agents of the said plaintiff and for and on account of said plaintiff, and subject to the orders of the said plaintiff, for commission and reward to the said defendants in that behalf; and the said defendants heretofore, to wit, on the day and year last aforesaid, had and received the said fifty shares of stock for the purpose aforesaid; and thereupon it became and was the duty of the said

defendants, as such pledgees, and as the brokers and agents of the said plaintiff, to hold as a pledge and to keep on hand and carry the said fifty shares of stock for and on account of the said plaintiff; yet, the said defendants, not regarding their duty in that behalf, but contriving and intending to injure and defraud the said plaintiff in this behalf, afterwards, to wit: on the 16th day of April, 1895, wrongfully, willfully and fraudulently and without the knowledge or consent of the said plaintiff and without any notice to him whatever, sold, delivered and disposed of another portion of said five hundred and fifty shares of stock above mentioned, to wit, fifty shares of the capital stock of the Metropolitan Traction Company, property of the plaintiff, of great value, to wit, of the value of seven thousand dollars, and then and there willfully and fraudulently and with intent to cheat and defraud the said plaintiff, converted
22 the said last mentioned fifty shares of stock and the proceeds of the sale thereof and plaintiff's reversionary interest in said stock to their own use, by means whereof, the said fifty shares of stock and the proceeds of the sale thereof, and plaintiff's reversionary interest in said stock were wholly lost to the said plaintiff.

5. And whereas also, heretofore, to wit, on the 30th day of June, 1894, at the city of Chicago, and county aforesaid the said Richard C. Crawford and Edward A. Valentine, defendants, were stockbrokers, and were then and there co-partners doing business, as stock brokers and dealers in investment securities, under the firm name of Crawford and Valentine; and whereas, before and at the time of the committing of the grievances by the said defendants, as hereinafter mentioned, the said plaintiff, at the special instance and request of the said defendants, had retained and employed the said defendants, as the brokers and agents of the said plaintiff, to hold and carry stocks for and on account of the said plaintiff, and subject to the said plaintiff's orders, for commission and reward to the said defendants in that behalf, and the said defendants then and there accepted and entered upon such retainer and employment, to wit, at the city and county aforesaid; and whereas the said plaintiff, heretofore, to wit, on the 29th day of January, 1895, at the special instance and request of the said defendants, caused to be delivered to and
23 placed under the control of, the said defendants, as the brokers, agents and pledgees of the said plaintiff, other and further shares of stock, to wit, three hundred shares of the capital stock of the Metropolitan Traction Company, property of the said plaintiff of great value, to wit, of the value of forty thousand dollars, to be held as a pledge and to be carried and kept on hand by the said defendants, for and on account of the said plaintiff and subject to the orders of said plaintiff, and for and as a pledge and security to the said defendants for the payment to them by the said plaintiff of the sum of twenty-four thousand dollars loaned and advanced or caused to be loaned and advanced by the said defendants to the said plaintiff; and the said defendants, on the day and year last mentioned, accepted and received the said three hundred shares of stock for the purposes aforesaid, and thereupon it became and was the

duty of the said defendants, as such pledgees, and as the brokers and agents of the said plaintiff, to hold, carry and keep on hand the said three hundred shares of stock for and on account of the said plaintiff and subject to the orders of the said plaintiff; yet, the said defendants, not regarding their duty in that behalf, but contriving and intending to injure and defraud the said plaintiff in this behalf, afterwards, to wit, on the 12th day of March, 1895, wrongfully, willfully and fraudulently, and without the knowledge or consent of the said plaintiff and without requiring payment of said loan and without any notice to the said plain-
24 tiff whatever sold, delivered and disposed of the said three hundred shares of stock of the said plaintiff, of great value, to wit, of the value of forty thousand dollars, and then and there willfully and fraudulently and with intent to injure, cheat and defraud the said plaintiff, converted the said three hundred shares of stock and the proceeds of the sale thereof and plaintiff's reversionary interest in said stock to their own use; by means whereof, the said three hundred shares of stock and the proceeds of the sale thereof and plaintiff's reversionary interest in said stock were wholly lost to the said plaintiff;

6. And whereas, also, heretofore, to wit, on the first day of October, 1894, the said defendants, as the broker and agents of the said plaintiff, had on hand and were then holding, and carrying for and on account of said plaintiff, and subject to the orders of said plaintiff, five hundred shares of the capital stock of the Metropolitan Traction Company, and were then and there protected against loss, on said stock, by margins and security theretofore paid to and deposited with said defendants by the said plaintiff; and afterwards to wit, on the 20th day of December, 1894, at the city and county aforesaid, the said defendants, contriving and intending to cheat, deceive and defraud the said plaintiff, falsely, fraudulently and deceitfully represented and affirmed to the said plaintiff that they—the said defendants, as the brokers and agents of the said plaintiff, then, to wit, on the 20th day of December, 1894, had on hand,
25 and were holding and carrying for and on account of the said plaintiff, the said five hundred shares of stock; that they, the said defendants, were then and there required and called upon to pay to and keep on deposit with their correspondents at Philadelphia, where said stock had been bought, margins and security on said five hundred shares to the extent of ten dollars per share over and above the current market value of said stock; that in order to protect them the said defendants, against loss, on account of said stock, and in order that they might be able to furnish to their correspondents the margins and security then required as aforesaid, it then and there was necessary for the said plaintiff, and the said plaintiff was then and there called upon by said defendants to pay to and deposit with them, the said defendants, a further large sum of money, to wit, the sum of two thousand dollars; and thereupon, to wit, on the day and year last aforesaid, at the city and county aforesaid, the said plaintiff confiding in the said representations and assertions of

the said defendants and believing them to be true, at the special instance and request of the said defendants, paid to and deposited with the said defendants a large sum of money, to wit, the sum of two thousand dollars, as further margins and security on said five hundred shares of stock; whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and representations by the
26 said defendants as aforesaid, the said defendants did not, as the brokers or agents of the said plaintiff or otherwise, have on hand nor were they then holding or carrying for or on account of the said plaintiff or for or on account of any one else, five hundred shares of the capital stock of the Metropolitan Traction Company, as the said defendants at the time of the making of the said false and fraudulent assertions and representations well knew; but on the contrary thereof the said defendants as the brokers and agents of the said plaintiff, then and there had on hand and were then and there holding and carrying for and on account of the said plaintiff, only four hundred shares of the capital stock of the Metropolitan Traction Company, as said defendants then and there well knew;

And whereas, in truth and in fact at the time of the making of the said false and fraudulent assertions and representations by the defendants, as aforesaid, the said defendants were not then and there required or called upon to pay or keep on deposit or otherwise, with their correspondents at Philadelphia, or elsewhere, margins or security on said five hundred shares or on any number of said shares, to the extent of ten dollars or any other sum, per share over or above the current market value of said stock, as the said defendants, at the time of the making of their said false and fraudulent assertions and representations well knew;

And whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and represen-
27 tations by the said defendants, as aforesaid, it was not necessary, in order to protect the said defendants against loss on account of said stock, or in order that they, the said defendants, might be able to furnish their said correspondents the margins or security required by said correspondents, for the said plaintiff to pay to or deposit with the said defendants, the further sum of two thousand dollars, or any sum whatever, as the said defendants at the time of the making of their said false and fraudulent representations, well knew; and the said plaintiff further saith that the said defendants by means of their said false, fraudulent and deceitful assertions and representations, afterwards, to wit, on the day and year last aforesaid, obtained and acquired from the said plaintiff a large sum of money, to wit, the sum of two thousand dollars and wrongfully and fraudulently converted the same to their own use, by means of which said several premises the said sum of two thousand dollars was wholly lost to the said plaintiff, to wit, at the county aforesaid;

7. And whereas, also, heretofore, to wit: on the 1st day of October,

1894, the said defendants, as the broker- and agents of the said plaintiff, had on hand and were then holding, and carrying for and on account of said plaintiff, and subject to the orders of said plaintiff, five hundred shares of the capital stock of the Metropolitan Traction Company, and were then and there protected against loss, on said stock, by margins and security theretofore paid to and
28 deposited with said defendants by the said plaintiff, and afterwards, on, to wit, the 11th day of January, 1895, at the city and county aforesaid, the said defendants, contriving and intending to cheat, deceive and defraud the said plaintiff, falsely, fraudulently and deceitfully represented and affirmed to the said plaintiff that they, the said defendants, as the brokers and agents of the said plaintiff, then to wit, on the 11th day of January, 1895, had on hand, and were holding and carrying for and on account of the said plaintiff, the said five hundred shares of stock; that they, the said defendants, were then and there required and called upon to pay to and keep on deposit with their correspondents at Philadelphia, where said stock had been bought margins and security on said five hundred shares to the extent of ten dollars per share over and above the current market value of said stock; that in order to protect them, the said defendants, against loss, on account of said stock, and in order that they might be able to furnish to their correspondents the margins and security then required as aforesaid, it then and there was necessary for the said plaintiff, and the said plaintiff was then and there called upon by said defendants to pay to and deposit with them, the said defendants, a further large sum of money, to wit, the sum of two thousand dollars. And thereupon, to wit, on the day and year last aforesaid, at the city and county aforesaid, the said plaintiff confiding in the said
29 representations and assertions of the said defendants and believing them to be true, at the special instance and request of the said defendants, paid to and deposited with the said defendants, a large sum of money, to wit, the further sum of two thousand dollars, as further margins and security on said five hundred shares of stock; whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and representations b they said defendants, as aforesaid, the said defendants did not, as the brokers or agents of the said plaintiff or otherwise, have on hand nor were they then holding or carrying for or on account of the said plaintiff or for or on account of any one else, five hundred shares of the capital stock of the Metropolitan Traction Company, as the said defendants at the time of the making of the said false and fraudulent assertions and representations well knew; but on the contrary the said defendants as the brokers and agents of the said plaintiff then and there had on hand and were then and there holding and carrying for and on account of the said plaintiff, only two hundred shares of the capital stock of the Metropolitan Traction Company, as said defendants then and *and* there well knew;

And whereas, in truth and in fact at the time of the making of the said false and fraudulent assertions and representations by the

defendants as aforesaid, the said defendants were not then and there required or called upon to pay or keep on deposit or otherwise, with their correspondents at Philadelphia, or elsewhere, margins or security on said five hundred shares or on any number of said shares, to the extent of ten dollars or any other sum, per share, over or above the current market value of said stock, as the said defendants, at the time of the making of their said false and fraudulent assertions and representations well knew; and whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and representations by the said defendants, as aforesaid, it was not necessary, in order to protect the said defendants against loss on account of said stock, or in order that they, the said defendants, might be able to furnish their said correspondents, the margins or security required by said correspondents for the said plaintiff to pay to or deposit with the said defendants, the further sum of two thousand dollars or any sum whatever, as the said defendants, at the time of the making of their said false and fraudulent representations, well knew; and the said plaintiff further saith that the said defendants by means of their said false, fraudulent and deceitful assertions and representations, afterwards, to wit, on the day and year last aforesaid, obtained and acquired from the said plaintiff a large sum of money, to wit, the sum of two thousand dollars and wrongfully and fraudulently converted the same to their own use, by means of which said several premises the said sum of two thousand dollars was wholly lost to the said plaintiff, to wit, at the county aforesaid:

8. And whereas, also, heretofore, to wit, on the 1st day of October, 1894, the said defendants as the brokers and agents of the said plaintiff, had on hand and were then holding and carrying for and on account of said plaintiff, and subject to the orders of said plaintiff, five hundred shares of the capital stock of the Metropolitan Traction Company, and were then and there protected against loss, on said stock by margins and security theretofore paid to and deposited with said defendants by the said plaintiff; and afterwards, on, to wit, the 25th day of January 1895, at the city and county aforesaid, the said defendants, contriving and intending to cheat, deceive and defraud the said plaintiff, falsely, fraudulently and deceitfully represented and affirmed to, the said plaintiff that they, the said defendants, as the brokers and agents of the said plaintiff, then to wit, on the 25th day of January, 1895, had on hand, and were holding and carrying for and on account of the said plaintiff, the said five hundred shares of stock that they, the said defendants, were then and there required and called upon to pay to and keep on deposit with their correspondents at Philadelphia, where said stock had been bought, margins and security on said five hundred shares to the extent of ten dollars per share over and above the current market value of said stock; that in order to protect them the said defendants, against loss, on account of said stock, and in order that they might be able to furnish to their correspondents the margins and security then required as aforesaid, it then and there was necessary for the said plaintiff,

and the said plaintiff was then and there called upon by said defendants to pay to and deposit with them, the said defendants, a further large sum of money, to wit, the sum of two thousand dollars. And thereupon, to wit, on the day and year last aforesaid, at the city and county aforesaid, the said plaintiff confiding in the said representations and assertions of the said defendants and believing them to be true, at the special instance and request of the said defendants, paid to and deposited with the said defendants, a large sum of money, to wit, the further sum of two thousand dollars, as further margins and security on said five hundred shares of stock;

Whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and representations by the said defendants, as aforesaid, the said defendants did not, as the brokers or agents of the said plaintiff, or otherwise, have on hand nor were they then holding or carrying for or on account of the said plaintiff or for or on account of any one else, five hundred shares of the capital stock of the Metropolitan Traction Company, as the said defendants at the time of the making of the said false and fraudulent assertions and representations well knew; but on the contrary thereof, the said defendants, as the brokers and agents of the said plaintiff, did not then or there have on hand nor were they
33 then or there holding or carrying for and on account of the said plaintiff any shares of Metropolitan Traction stock whatever, as said defendants then and there well knew; and whereas, in truth and in fact at the time of the making of said false and fraudulent assertions and representations by the defendants, as aforesaid, the said defendants were not then or there required or called upon to pay or keep on deposit or otherwise, with their correspondents at Philadelphia, or elsewhere, margins or security on said five hundred shares or on any number of said shares, to the extent of ten dollars or any other sum, per share, over or above the current market value of said stock, as the said defendants, at the time of the making of their said false and fraudulent assertions and representations, well knew; and whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and representations by the said defendants, as aforesaid, it was not necessary, in order to protect the said defendants against loss on account of said stock, or in order that they, the said defendants, might be able to furnish their said correspondents the margins or security required by said correspondents, for the said plaintiff to pay to or deposit with the said defendants, the further sum of two thousand dollars or any sum whatever, as the said defendants, at the time of the making of their said false and fraudulent representations, well knew, and the said plaintiff further saith that the said defendants by means of their said
34 false, fraudulent and deceitful assertions and representations, afterwards, to wit, on the day and year last aforesaid, obtained and acquired from the said plaintiff a large sum of money to wit, the sum of two thousand dollars and wrongfully and fraudulently converted the same to their own use, by means of which several

premises the said sum of two thousand dollars was wholly lost to the said plaintiff, to wit, at the county aforesaid;

9. And whereas, also, heretofore, to wit, on the first day of October, 1894, the said defendants as the broker and agents of the said plaintiff, had on hand and were then holding, and carrying for and on account of said plaintiff, and subject to the orders of said plaintiff, five hundred shares of the capital stock of the Metropolitan Traction Company, and were then and there protected against loss on said stock by margins and security theretofore paid to and deposited with said defendants by the said plaintiff, and afterwards, on, to wit, the 29th day of January, 1895, at the city and county aforesaid, the said defendants, contriving and intending to cheat, deceive and defraud the said plaintiff, falsely, fraudulently and deceitfully represented and affirmed to the said plaintiff that they, the said defendants, as the brokers and agents of the said plaintiff, then, to wit, on the 29th day of January, 1895, had on hand, and were holding and carrying for and on account of the said plaintiff, the said five hundred shares of stock; that they, the said defendants, were then and there
35 required and called upon to pay and keep on deposit with their correspondents at Philadelphia, where said stock had been bought, margins and security on said five hundred shares to the extent of ten dollars per share over and above the current market value of said stock, that in order to protect them, the said defendants, against loss, on account of said stock, and in order that they might be able to furnish to their correspondents the margins and security then required as aforesaid, it then and there was necessary for said plaintiff, and the said plaintiff was then and there called upon by said defendants to pay to and deposit with them, the said defendants, a further large sum of money, to wit, the sum of one thousand dollars. And thereupon, to wit, on the day and year last aforesaid, at the city and county aforesaid, the said plaintiff, confiding in the said representations and assertions of the said defendants, and believing them to be true, at the special instance and request of the said defendants, paid to and deposited with the said defendants a large sum of money, to-wit, the further sum of one thousand dollars, as further margins and security on said five hundred shares of stock; whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and representations by the said defendants as aforesaid, the said defendants did not, as the brokers or agents of the said plaintiff, or otherwise, have on hand nor were they then holding or carrying for — on account of the said plaintiff, or for or on ac-
36 count of any one else, five hundred shares of the capital stock of the Metropolitan Traction Company, as the said defendants at the time of the making of the said false and fraudulent assertions and representations well knew; but on the contrary thereof, the said defendants, as the brokers and agents of the said plaintiff, then and there had on hand and were then and there holding and carrying for and on account of the said plaintiff only three hundred shares of the capital stock of the Metropolitan Traction Company,

as said defendants then and there well knew; and whereas, in truth and in fact at the time of the making of said false and fraudulent assertions and representations by the defendants, as aforesaid, the said defendants were not then and there required or called upon to pay or keep on deposit or otherwise, with their correspondents at Philadelphia, or elsewhere, margins or security on said five hundred shares or on any number of said shares, to the extent of ten dollars or any other sum per share, over or above the current market value of said stock as the said defendants, at the time of the making of their said false and fraudulent assertions and representations well knew; and whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and representations by the said defendants, as aforesaid, it was not necessary, in order to protect the said defendants against loss on account of said stock, or in order that they, the said defendants, might
37 be able to furnish their said correspondents the margins or security required by said correspondents for the said plaintiff to pay to or deposit with the said defendants, the further sum of one thousand dollars, or any sum whatever, as the said defendants, at the time of the making of their false and fraudulent representations well knew, and the said plaintiff further saith that the said defendants by means of their said false, fraudulent and deceitful assertions and representations afterwards, to wit, on the day and year last aforesaid, obtained and acquired from the said plaintiff a large sum of money, to wit, the sum of one thousand dollars, and wrongfully and fraudulently converted the same to their own use, by means of which said several premises the said sum of one thousand dollars was wholly lost to the said plaintiff, to wit, at the county aforesaid.

10. And whereas, also, heretofore, to wit, on the 1st day of October, 1894, the said defendants as the brokers and agents of the said plaintiff, had on hand and were then holding, and carrying for and on account of said plaintiff, and subject to the orders of said plaintiff, five hundred shares of the capital stock of the Metropolitan Traction Company, and were then and there protected against loss, on said stock by margins and security theretofore paid to and deposited with said defendants by the said plaintiff; and the said plaintiff further saith that heretofore, to wit, on the
38 28th day of March, 1895, the said defendant as the brokers and agents of the said plaintiff and at the said plaintiff's request, purchased for and on account of the said plaintiff other and further shares of the capital stock of the Metropolitan Traction Company, to wit, fifty shares of said stock, property of plaintiff, of great value to wit, seven thousand dollars, to be held as a pledge by said defendant and to be carried and kept on hand by said defendants as the brokers and agents of the said plaintiff and for and on account of said plaintiff and subject to the orders of said plaintiff for commission and reward to the said defendants in that behalf, and the said defendants heretofore, to wit, on the day and year last aforesaid had and received the said fifty shares of stock for the purpose aforesaid; and afterwards to wit, on the first day of

April 1895, at the city and county aforesaid, the said defendants contriving and intending to cheat, deceive and defraud the said plaintiff falsely, fraudulently and deceitfully represented and affirmed to the said plaintiff that they, the said defendants, as the brokers and agents of the said plaintiff, then, to wit, on the 1st day of April, 1895, had on hand and were holding and carrying for and on account of the said plaintiff the said five hundred and fifty shares of stock above mentioned; that they, the said defendants, were then and there required and called upon to pay to and keep on deposit with their correspondents at Philadelphia, where said stock had been bought, margins and security on said five hundred and fifty shares of stock to the extent of ten dollars per share over and above the current market value of said stock; that in order to protect
39 them, the said defendants, against loss on account of said stock, and in order that they might be able to furnish to their correspondents the margin and security then required as aforesaid, it then and there was necessary for the said plaintiff and the said plaintiff was then and there called upon by said defendants to pay to and deposit with them, the said defendants, a further large sum of money to wit, the sum of three thousand eight hundred dollars, and thereupon, to wit, on the day and year last aforesaid, at the city and county aforesaid, the said plaintiff confiding in the said representations and assertions of the said defendant- and believing them to be true, at the special instance and request of the said defendants, paid to and deposited with the said defendants a large sum of money, to wit, the further sum of three thousand eight hundred dollars, as further margins and security on said five hundred and fifty shares of stock above mentioned; whereas, in truth and in fact, at the time of the making of the said false and fraudulent assertions and representations by the said defendants as aforesaid, the said defendants did not, as the brokers or agents of the said plaintiff or otherwise, have on hand nor were they then holding or carrying for or on account of the said plaintiff or for or on account of any one else, five hundred and fifty shares or any number of shares of the capital stock of the Metropolitan Traction Company, as the said defendants, at the time of the making of the said false
40 and fraudulent assertions and representations, well knew, but on the contrary, thereof, the said defendants as the brokers and agents of the said plaintiff, did not then or there have on hand nor were they then or there holding or carrying for or on account of said plaintiff, any shares of Metropolitan Traction stock whatever, as the said defendants then and there well knew; and whereas, in truth and in fact, at the time of the making of said false and fraudulent assertions and representations by the said defendants, as aforesaid, the said defendants were not then or there required or called upon to pay or keep on deposit or otherwise, with their correspondents at Philadelphia or elsewhere, margins or security on said five hundred and fifty shares above mentioned or on any number of said shares, to the extent of ten dollars or any other sum per share over or above the current market value of said stock as the said de-

fendants at the time of the making of their said false and fraudulent assertions and representations well knew; and whereas, in truth and in fact at the time of the making of the said false and fraudulent assertions and representations by the said defendants, as aforesaid, it was not necessary in order to protect the said defendants against loss on account of said stock or in order that they, the said defendants, might be able to furnish their said correspondents the margin or security required by said correspondents, for the said plaintiff to pay to or deposit with the said de-
41 fendants the further sum of three thousand eight hundred dollars or any sum whatever, as the said defendants, at the time of making of their false and fraudulent representations, well knew; and the said plaintiff further saith that the said defendants, by means of their said false, fraudulent and deceitful assertions and representations afterwards, to wit, on the day and year last aforesaid, obtained and acquired from the said plaintiff a large sum of money to wit, the sum of three thousand eight hundred dollars, and wrongfully and fraudulently converted the same to their own use, by means of which said several premises, the said sum of three thousand eight hundred dollars was wholly lost to the said plaintiff, to wit, at the county aforesaid;

Wherefore, the plaintiff says that he is injured and has sustained damage to the amount of thirty thousand dollars, and therefore he brings his suit, etc.

JOHN E. BURKE,
Plaintiff & Attorney pro Se.

42 [Endorsed:] 173384. John E. Burke *vs.* Richard C. Crawford & E. A. Valentine. Copy declaration. Filed Sept. 10", 1897. John A. Cooke, clerk. John E. Burke, plaintiff & att'y pro se.

43 And afterwards, to-wit, on the 20th day of September A. D. 1897 a certain plea was filed in the office of the clerk of said court, in words and figures following to-wit.

44 STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Circuit Court of Cook County.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD ET AL. } 173,384–19960.

And the defendant, Edward A. Valentine, by Flower, Smith & Musgrave, his attorneys, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against

him. And of this the defendant puts himself upon the country, etc.

FLOWER, SMITH & MUSGRAVE,
Att'ys for Valentine.

Filed Sep. 20, 1897.

JOHN A. COOKE, *Clerk.*

45 And afterwards, to-wit, on the 21st day of September A. D. 1897 a certain plea was filed in the office of the clerk of said court, in words and figures following to wit:

46 STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County, September Term, A. D. 1897.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD and EDWARD A. Valentine. } Gen. No. 173,384.

And now comes the defendant Richard C. Crawford, impleaded with Edward A. Valentine, in the above entitled cause, and defends the wrong and injury, when, etc., and says that he is not guilty in manner and form as the said plaintiff hath above in his said declaration alleged against him; and of this he puts himself upon the country.

By his attorneys, PECKHAM & BROWN.

Filed Sep. 21 1897.

JOHN A. COOKE, *Clerk.*

(Copy.)

47 And afterwards to-wit, on the 11th day of January A. D. 1899 a certain appearance was filed in the office of the clerk of said court, in words and figures following to-wit.

48 Copy.

STATE OF ILLINOIS, } ss:
Cook County, }

In Circuit Court of said County.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD & EDWARD A. VALENTINE. } Gen. No. 173,384, Term No. 7704. Case.

I hereby enter my appearance as attorney for plaintiff in the above entitled causes.

Dated January 10th, 1899.

A. M. PENCE.

Filed Jan. 11th, 1899.

JOHN A. COOKE, *Clerk.*

49 And afterwards, to-wit, on the 4th day of January A. D. 1900 two certain replications *was* filed in the office of the clerk of said court, in words and figures following to-wit.

50 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of said County, December Term, A. D. 1899.

JOHN E. BURKE, Plaintiff,
vs.
RICHARD C. CRAWFORD and EDWARD A. Valentine, Defendants. } Gen. No. 173,384.

And the plaintiff, as to the plea of the said Edward A. Valentine, defendant, by him above pleaded, and whereof he hath put himself upon the country, doth the like, etc.

JOHN E. BURKE, *Plaintiff.*

Filed Jan. 4 1900

JOHN A. COOKE, *Clerk.*

51 Copy.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of said County, December Term, A. D. 1899.

JOHN E. BURKE, Plaintiff,
vs.
RICHARD C. CRAWFORD and EDWARD A. Valentine, Defendants. } Gen. No. 173,384.

And the plaintiff, as to the plea of the said Richard C. Crawford, defendant, by him above pleaded, and whereof he hath put himself upon the country, doth the like, etc.

JOHN E. BURKE, *Plaintiff.*

Filed Jan. 4 1900.

JOHN A. COOKE, *Clerk.*

52 And afterwards, to-wit, on the 12th day of April A. D. 1900 two certain notices *was* filed in the office of the clerk of said court, in words and figures following to-wit.

53 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN E. BURKE
v.
RICHARD C. CRAWFOBD and EDWARD A. Valentine. } Gen. No. 173,384, Term No. 7704.

The plaintiff will take notice that on the trial of this cause the defendant, Edward Archibald Valentine, will give in evidence under the general issue, that after the making of the several supposed promises in the declaration and the amended declaration herein, and in each count thereof mentioned and on, to wit, the 5th day of April 1900, the district court of the United States of America, for the northern district of Illinois, northern division, granted to said defendant, Edward Archibald Valentine, a certain discharge in bankruptcy in these words and figures, to wit:

"Whereas Richard C. Crawford and E. Archibald Valentine, individually and as co-partners under the firm name and style of Crawford and Valentine of Chicago, in said district, have been duly adjudged bankrupts under the acts of Congress relating to bankruptcy, and appear to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Richard C. Crawford and E. Archibald Valentine, individually and as co-partners under the firm name and style of Crawford & Valentine, be discharged from all debts and claims which are made provable by said acts against their individual and co-partnership estates, and which existed on the 29th day of April, A. D. 1899, on which day the petition for adjudication was filed by them; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

That the several supposed causes of action in the said declaration and amended declaration, and in each count thereof, are in respect of debts and claims, and each of them is in respect of a debt and claim, made provable by said acts of Congress relating to
54 bankruptcy, against the estate of the said defendant, Edward Archibald Valentine, and the same were provable against his said estate, both individual and co-partnership as aforesaid; that the said supposed causes of action are not, nor is any one of them, in respect of any such debts or debt, as are or is by the said acts excepted from the operation of a discharge in bankruptcy. And the defendant will insist that by reason of said discharge in bankruptcy this defendant, Edward Archibald Valentine, was and is released from any and all the claims, debts and causes of action for which recovery is sought by the plaintiff in this case.

Yours, etc., FLOWER, SMITH & MUSGRAVE,
Attorneys for Defendant Edward Archibald Valentine.

Filed Apr. 12, 1900.

JOHN A. COOKE.

55 STATE OF ILLINOIS, } ss.:
County of Cook, }

In the Circuit Court of Cook County.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD and EDWARD A. Valentine.
} Gen. No. 173,384, Term No. 7704.

The plaintiff will take notice that on the trial of this cause the defendant, Richard C. Crawford, will give in evidence under the general issue, that after the making of the several supposed promises in the declaration and the amended declaration herein, and in each count thereof mentioned, and on, to-wit: the fifth day of April, 1900, the district court of the United States of America, for the northern district of Illinois, northern division, granted to said defendant, Richard C. Crawford, a certain discharge in bankruptcy in those words and figures, to wit:

"Whereas, Richard C. Crawford and *B.* Archibald Valentine individually and as co-partners under the firm name and style of Crawford and Valentine of Chicago, in said district, have been duly adjudged bankrupts under the acts of Congress relating to bankruptcy, and appear to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Richard C. Crawford and E. Archibald Valentine, individually and as co-partners under the firm name and style of Crawford & Valentine, be discharged from all debts and claims which are made provable by said acts ag-inst their individual and co-partnership estates, and which existed on the 29th day of April, A. D. 1899, on which day the petition for adjudication was filed by them; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

That the several supposed causes of action in the said declaration and amended declaration, and in each count thereof, are in respect of debts and claims, and each of them is in respect of a debt and claim, made provable by said acts of Congress relating to bankruptcy, against the estates of the said defendant, Richard C. Crawford, and the same were provable against his said estate, both
56 individual and co-partnership as aforesaid; that the said supposed causes of action are not, nor is any one of them, in respect of any such debts or debt, as are or is by the said acts excepted from the operation of a discharge in bankruptcy. And the defendant will insist that by reason of said discharge in bankruptcy this defendant, Richard C. Crawford, was and is released from any and all the claims, debts and causes of action for which recovery is sought by the plaintiff in this case.

PECKHAM, BROWN & PACKARD,
Attorneys for Defendant Richard C. Crawford.

Filed April 12 1900

JOHN A. COOKE.

57 And afterwards, to-wit, on the 19th day of June A. D. 1900 a certain stipulation was filed in the office of the clerk of said court, in words and figures following to-wit.

58 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of said County.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD and EDWARD A. Valentine. } Gen. No. 173,384, Term No. 7704.

It is hereby stipulated and agreed that a jury trial in the above entitled cause be, and the same is hereby waived, and that said cause shall be tried by the court without a jury.

It is further stipulated that said cause may be set for trial on Tuesday, the 19th day of June, 1900.

Dated May 12, 1900.

RICHARD C. CRAWFORD.
EDWARD A. VALENTINE.
FLOWER, VROMAN & MUSGRAVE,
Att'ys for Valentine.
PECKHAM, BROWN & PACKARD,
Att'ys for Crawford.
JOHN E. BURKE, *Plaintiff.*

Filed June 19 1900.

JOHN A. COOKE, *Clerk.*

59 And afterwards, to-wit, on the 6th day of October A. D. 1900 a certain stipulation was filed in the office of the clerk of said court, in words and figures following to-wit.

60 STATE OF ILLINOIS:

Circuit Court, Cook County.

JOHN E. BURKE
vs.
R. C. CRAWFORD & E. A. VALENTINE.

It is stipulated that the above entitled action be set for trial the 23rd day of October 1900.

Dated Oct. 5, 1901.

JOHN E. BURKE, *Plaintiff.*
PECKHAM, BROWN & PACKARD,
Att'ys for Crawford.
FLOWER, VROMAN & MUSGRAVE,
Att'ys for Valentine.

Filed Oct. 6 1900.

JOHN A. COOKE, *Clerk.*

61 And afterwards, to-wit on the 14th day of November, A. D. 1900 a certain stipulation was filed in the office of the clerk of said court, in words and figures following to-wit:

62 Copy.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD and E. A. VALENTINE. } Gen. No. 173,384, Term No. 2351.

It is agreed that the above entitled cause may be set for trial on Tuesday, November 26, 1900, and that the same may be placed at the head of the trial call for that day.

Dated November 14, 1900.

PECKHAM, BROWN & PACKARD,
Attorneys for Crawford.
FLOWER, VROMAN & MUSGRAVE,
Attorneys for Valentine.
JOHN E. BURKE, *Plaintiff.*

Filed Nov. 14, 1900.

JOHN A. COOKE, *Clerk.*

63 And afterwards, to-wit, on the 3rd day of January A. D. 1901 a certain plea and special plea was filed in the office of the clerk of said court in words and figures following, to-wit.

64 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County, December Term, 1900.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD and E. ARCHIBALD VALentine. } 173,384, 7704.

And now on this day comes said defendant, Richard C. Crawford, by Peckham, Brown & Packard, his attorneys, and says that the plaintiff ought not further to maintain his aforesaid action against him, said defendant, because he says that after the last pleading in this cause, that is to say, on to-wit: the 29th day of April, 1899, said defendant, Richard C. Crawford, filed in the district court of the United States of America for the northern district of Illinois, northern division, in which said district and division this defendant had

resided for more than the period of six months next immediately preceding said date, a voluntary petition in bankruptcy, in due form, as provided by the laws of the United States in that behalf, and thereafter, and on the 5th day of April, 1900, said district court, it having full and complete jurisdiction of said defendant for that purpose, and of the subject matter, granted to said defendant, Richard C. Crawford, a certain discharge in bankruptcy in these words and figures, to-wit:

"Whereas Richard C. Crawford and E. Archibald Valentine, individually and as co-partners under the firm name and style of Crawford and Valentine of Chicago, in said district, have been
65 duly adjudged bankr-pts, under the acts of Congress relating to bankruptcy and appear to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Richare C. Crawford and E. Archibald Valentine, individually and as co-partners under the firm name and style of Crawford & Valentine, be discharged from all debts and claims which are made provable by said acts against their individual and co-partnership estates, and which existed on the 29th day of April, A. D. 1899, on which day the petition for adjudication was filed by them; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

That the several supposed causes of action in the said declaration and in each count thereof mentioned, are in respect of debts and claims, and each of them is in respect of a debt or claim made provable by said acts of Congress relating to bankruptcy, against the estate of the said defendant, Richard C. Crawford, and the same were provable against his said estate, both individually and co-partnership, as aforesaid; that the said supposed causes of action are not, nor is any one of them, in respect of any such debts or debt as are or is by the said acts excepted from the operation of a discharge in bankruptcy.

And this said defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action, etc.

PECKHAM, BROWN & PACKARD,
Attorneys for Defendant Richard C. Crawford.

STATE OF ILLINOIS, }
County of Cook, } ss:

Richard C. Crawford, being first duly sworn says that he is the above named defendant; that he has read the foregoing plea, knows the contents thereof, and the same is true.

RICHARD C. CRAWFORD.

Subscribed and sworn to before me this 12th day of May, A. D. 1900.

EDWARD O. BROWN,
Notary Public.

66 Copy.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County, December Term, 1900.

JOHN E. BURKE
v.
RICHARD C. CRAWFORD and EDWARD A. VALENTINE. } 173,384, 7704.

And now on this day comes said defendant, Edward A. Valentine, by Flower, Vroman & Musgrave, his attorneys, and says that the plaintiff ought not further to maintain his aforesaid action against him, said defendant, because he says that after the last pleading in this cause, that is to say, after the 20th of September, 1897, and on, to-wit, on the 29th day of April 1899, said defendant Edward A. Valentine filed in the district court of the United States of America, for the northern district of Illinois, northern division, in which said district and division this defendant had resided for more than the period of six months next immediately preceding said date, a voluntary petition in bankruptcy, in due form, as provided by the laws of the United States in that behalf, and thereafter, and on the 5th day of April, 1900, said district court, it having full and complete jurisdiction of said defendant for that purpose, and of the subject matter, granted to said defendant, Edward A. Valentine, a certain discharge in bankruptcy in these words and figures, to wit:

"Whereas Richard C. Crawford and E. Archibald Valentine, individually and as co-partners under the firm name and style of Crawford and Valentine of Chicago, in said district, have been duly adjudged bankrupts under the acts of Congress relating to bankruptcy, and appear to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Richard C. Crawford and E. Archibald Valentine, individually and as co-partners under the firm name and style of Crawford & Valentine, be discharged from all debts and claims which are made provable by said acts against their individual and copartnership
67 estates, and which existed on the 29th day of April, A. D. 1899, on which day the petition for adjudication was filed by them; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

That the several supposed causes of action in the said declaration and in each count thereof mentioned, are in respect of debts and claims, and each of them is, in respect of a debt and claim made provable by said acts of Congress relating to bankruptcy, against the estate of the said defendant, E. Archibald Valentine, and the same were provable against his said estate, both individual and co-partnership, as aforesaid; that the said supposed causes of action are

not, nor is any one of them, in respect of any such debts or debt as are or is by the said acts excepted from the operation of a discharge in bankruptcy.

And this said defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action, etc.

FLOWER, VROMAN & MUSGRAVE,
Attorneys for Defendant Edward A. Valentine.

STATE OF ILLINOIS, } ss:
County of Cook, }

Edward A. Valentine being first duly sworn says that he is the above named defendant; that he has read the foregoing plea, knows the contents thereof, and the same is true.

EDWARD A. VALENTINE.

Subscribed and sworn to before me this 12th day of May, A. D. 1900.

STELLA W. TENNEY,
Notary Public.

[NOTARIAL SEAL.]

Filed Jan. 3, 1901.

JOHN A. COOKE, *Clerk.*

68 Thereupon on the same day, to-wit, on the 3rd day of January A. D. 1901 two certain replications *was* filed in the office of the clerk of said court, in words and figures following to-wit.

69 STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of said County, December Term, 1900.

JOHN E. BURKE *vs.* RICHARD C. CRAWFORD and EDWARD A. VALENTINE.	Gen. No. 173,384, Term No. 2351.

Replication to the Plea of Richard C. Crawford, Defendant.

And the plaintiff, as to the plea of the defendant, Richard C. Crawford, by him above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from further maintaining his aforesaid action against him, the said Richard C. Crawford, because the plaintiff says that the several causes of action in the declaration mentioned, and the cause of action in each count thereof mentioned, are not and is not in respect of debts or claims, nor is any or either of them in respect of a debt or claim, made provable by the acts of Congress relating to bankruptcy, against the individual or co-partnership estate of the said defendant, Richard C.

Crawford; and the plaintiff says that said causes of action are, and each of them is, in respect of such debts, claims, demands or damages as are or is, by the said act of Congress, excepted from the operation of a discharge in bankruptcy, and are not causes of action, nor is any or either of them a cause of action, in respect of any such debts, claims, demands or damages as are not, by the said acts of Congress excepted from the operation of a discharge in bankruptcy, as the said defendant has in his plea alleged; and this the plaintiff prays may be inquired of by the country, etc.

PENCE & CARPENTER,
Att'ys for Plaintiff.

THOS. A. MORAN, *Counsel.*

70 STATE OF ILLINOIS, } ss.:
Cook County, }

In the Circuit Court of Cook County, December Term, 1900.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD and EDWARD A. VALENTINE. } Gen. No. 173,384, Term No. 2351.

Replication to the Plea of Edward A. Valentine, Defendant.

And the plaintiff, as to the plea of the defendant, Edward A. Valentine, by him above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from further maintaining his aforesaid action against him, the said Edward A. Valentine, because the plaintiff says that the several causes of action in the declaration mentioned, and the cause of action in each count thereof mentioned, are not and is not in respect of debts or claims, nor is any or either of them in respect of a debt or claim, made provable by the acts of Congress relating to bankruptcy, against the individual or copartnership estate of the said defendant Edward A. Valentine; and the plaintiff says that said causes of action are, and each of them is, in respect of such debts, claims, demands or damages as are or is, by the said acts of Congress, excepted from the operation of a discharge in bankruptcy, and are not causes of action, nor is any or either of them a cause of action, in respect of any such debts, claims, demands or damages as are not, by the said acts of Congress, excepted from the operation of a discharge in bankruptcy, as the said defendant has in his plea alleged; and this the plaintiff prays may be inquired of by the country, etc.

PENCE & CARPENTER,
Plaintiff's Att'ys.

THOS. A. MORAN, *Of Counsel.*

Filed Jan. 3 1901

JOHN A. COOKE, *Clerk.*

5—247

71 And afterwards, to-wit, on the 14th day of February A. D. 1901 the following proceedings were had and entered of record in said court to-wit.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD ET AL. } 173,384. Case.

This day again come the parties to this suit by their attorneys respectively and the court now hereafter hearing all the evidence adduced and being fully advised in the premises, finds the defendants Richard C. Crawford and Edward A. Valentine, guilty and assesses the plaintiffs damages to the sum of nine thousand and six hundred ninety dollars and twenty-one cents.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendants, Richard C. Crawford and Edward A. Valentine, his said damages of nine thousand six hundred ninety dollars and twenty one cents $9690.21 in form as aforesaid by the court assessed together with his costs and charges in this behalf expended and have execution therefor.

Thereupon the defendants having entered their exceptions herein pray an appeal from the judgment of this court to the appellate court in and for the first district of Illinois which is allowed upon said defendants filing herein their appeal bond in the penal sum of fifteen thousand dollars to be approved by the court together with their bill of exceptions within thirty days from this date.

72 Be it remembered that heretofore, to-wit, on the 12th day of April A. D. 1900 the following proceedings were had and entered of record in said court to-wit.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD ET AL. } Case 173,384.

On motion of attorney for Eva Valentine and Richard C. Crawford it is ordered that leave be and the same is hereby given them to file notice of special matter of defence under general issue instanter to which the plaintiff objects, objection overruled and plaintiff excepted.

73 And afterwards, to-wit, on the 23rd day of April, A. D. 1900 the following proceedings were had and entered of record in said court to-wit.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD ET AL. } Case 173,384.

Ordered that the time for filing exceptions to filing of new matter under general issue be extended five days.

And afterwards, to-wit, on the 19th day of June A. D. 1900 the following proceedings were had and entered of record in said court to-wit.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD ET AL. } Case 173,384.

On the stipulation of the parties to this suit filed herein this cause is submitted to the court for trial without a jury and set for trial on the 19th day of June A. D. 1900.

74 And afterwards, to-wit, on the 3rd day of January A. D. 1901 the following proceedings were had and entered of record in said court to-wit.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD ET AL. } Case 173,384.

Ordered that leave be and the same is hereby given said defendants to file special plea herein instanter and it is ordered that the plaintiff be and he is hereby required to reply to said special plea instanter.

75 And afterwards, to-wit, on the 14th day of March A. D. 1901 a certain stipulation was filed in the office of the clerk of said court, in words and figures following to-wit.

76 STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Circuit Court of Cook County, February Term, 1901.

JOHN E. BURKE
vs.
RICHARD C. CRAWFORD and EDWARD A. VALENTINE.

It is hereby stipulated and agreed by and between parties hereto, that the original bill of exceptions in the above entitled cause may be incorporated in the transcript of the record made for the appellate court instead of a copy thereof.

FLOWER, VROMAN & MUSGRAVE &
PECKHAM, BROWN & PACKARD,
For Appellants.

JOHN E. BURKE, *Plaintiff.*

And thereupon, on the same day, to-wit, on the 14th day of March A. D. 1901 a certain bill of exceptions was filed in the office of the clerk of said court, in words and figures following to-wit.

77 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County, December Term, A. D. 1900.

JOHN E. BURKE }
vs.
R. C. CRAWFORD ET AL. }

Bill of Exceptions.

Be it remembered that heretofore, to-wit, on the 3rd day of January, A. D. 1901, the same being one of the days of the December term of said court, before his honor, Edward F. Dunne, one of the judges of said court, sitting on the common law side thereof, without a jury, a jury having been waived in writing by the defendants and also by the plaintiff, this cause came on for hearing before the court without a jury.

Messrs. Pence and Moran appearing for plaintiff.

Messrs. Brown and Vrooman appearing for defendants.

And thereupon the plaintiff to maintain the issues on his part, introduced the following evidence, to-wit:

78 Mr. BROWN: I don't know whether your honor is fully aware of the fact that in this case I represent Mr. Crawford, one of the defendants, and Mr. Vrooman, of Flower & Musgrave represents Mr. Valentine the other defendant; I move, however, for him as well as for myself, for leave to file additional pleas this morning as *puis darrien* continuance.

Mr. PENCE: On behalf of both?

Mr. BROWN: On behalf of each.

Mr. MORAN: The plea, as formed, presents a wholly immaterial issue, but we are not disposed to take up the time arguing it, but we will make an issue on it, we can't of course do it at this moment, but we will go on with the trial. We will reply in accordance with the facts.

The COURT: I will give them leave to file their plea and if you make any motion after it is filed I will entertain that motion. Leave to file *puis darrien* continuance instanter and rule on the plaintiff to reply thereto instanter, that is during the trial.

Mr. BROWN: Can't you tell us anything about the nature of your reply?

Mr. PENCE: We cannot deny your discharge in bankruptcy, of course, and there is nothing else to deny except your legal conclusion.

The COURT: You will reply, in other words, admitting the
79 bankruptcy by denying the discharge of this particular debt.

Mr. MORAN: We will take issue on counsel's allegations of his plea.

The COURT: I think they will have their replication on file before coming to your side of the case.

Mr. MORAN: I think so. We cannot do anything else but deny your conclusions.

Mr. BROWN: That is satisfactory.

JOHN E. BURKE the plaintiff called as a witness in his own behalf, being first duly sworn, was examined in chief by Mr. Pence and testified as follows:

Q. What is your name?

A. John E. Burke.

Q. You are the plaintiff in this case?

A. I am, yes sir.

Q. What has been your bisiness in the past?

A. Attorney at law.

Q. How long have you resided in Chicago and Cook county?

A. Upwards of 25 years.

Q. Have you held any official position whilst you have resided in Chicago?

A. I have.

Q. What was it?

A. I was assistant United States attorney for 4 years.

Q. Did you know the firm of Valentine & McAvoy in 1893 and 1894?

A. I did.

Q. Who composed the firm?

A. Edward A. Valentine and Charles P. McAvoy.

Q. In what business were Valentine & McAvoy engaged and where?

A. They were engaged in business as bankers and brokers here in this city.

Q. Did the firm of Valentine & McAvoy dissolve and if so when?

A. They did, they dissolved about the first day of July 1894.

Q. When did the defendants form a co-partnership and in what business were they engaged?

A. They formed a co-partnership about the first day of July 1894 engaging in business as bankers and brokers here in the city.

Q. What kind of brokers?

A. Stock brokers, stock and bonds.

The COURT: Is this the new firm?

A. Yes, sir.

Q. Valentine and——

A. Crawford & Valentine.

Mr. PENCE:

Q. Valentine & McAvoy were also stock brokers?

A. Yes, sir.

Q. At the time Valentine & McAvoy dissolved partnership did you have any property in their hands or under their control?

A. I did.

Q. What was that property?

81 A. 450 shares of the capital stock of the Metropolitan Traction Company and 100 shares of the capital stock of the Chesapeake & Ohio Railroad Company, which they had bought for me as my brokers.

Q. Through whom did they purchase the Metropolitan Traction stock?

A. Through Dick Brothers & Company of Philadelphia, their correspondents at Philadelphia.

Q. 450 shares?

A. Yes, sir.

Q. At the time Valentine & McAvoy dissolved partnership what, if anything did you owe them on the stock that they held for you, and what was the market value of that stock at that time?

A. I owed them $45,949.28.

Q. Was that the market value?

A. The market value of that stock at that time was $52,531.25.

Q. When Valentine & McAvoy dissolved partnership, what was done with the stock and the amount that you owed on it?

A. The stock and the amount that I owed on it was transferred to the new firm of Crawford & Valentine?

Q. With or without your consent?

A. With my consent, to be held by them as my brokers.

Q. Did the defendant- ever purchase any Metropolitan stock for you and on your order and if so how much and when?

A. They did on the 28th day of September 1894, they purchased 50 shares of the Metropolitan Traction——

The COURT: That was the old firm?

A. No. That was the new firm.

82 Q. The dissolution took place in July 1894?

A. Yes sir. On September 28th 1894 they purchased for me on my order 50 shares of the capital stock of the Metropolitan Traction Company at 116½, and on the 28th day of March 1895 they purchased for me 50 shares more of Metropolitan Traction stock on my order at 93. Those are the only purchases that they ever made for me.

Mr. PENCE:

Q. On your order?

A. On my order or with my knowledge and——

Q. Consent?

A. Yes sir.

Q. That is these are the only purchases ever made for you on your order or with your knowledge and consent?

A. Yes sir.

Q. Through whom did the defendants make the purchases to which you have referred?

A. Through Dick Bros. & Co. of Philadelphia, their correspondents at Philadelphia.

Q. Did you ever receive from the defendants written notices of the purchases?
A. I did, yes sir.
Q. Will you produce these notices?

Mr. BROWN: We would like to see them before you put them in.
Mr. PENCE: Certainly.

A. I hand you the notice of September 28th 1894, also the notice of March 28th 1895.
83 Mr. PENCE. I think I will read them right into the record.
The WITNESS: Yes.
Mr. PENCE: I offer these in evidence and read the same into the record; they are as follows:

"Crawford & Valentine, bankers and brokers, 118 La Salle street.

CHICAGO, *September 28th*, 1894.

J. E. Burke.

DEAR SIR: We have this day bought for your account and risk 50 shares Metropolitan Traction, price 116½."

I also read the next notice——
The WITNESS: There is a signature to it.
Mr. PENCE: "Respectfully yours, Crawford & Valentine."
84 Mr. PENCE: I will also read the following in evidence:

Crawford & Valentine, bankers — brokers, 118 La Salle street.

CHICAGO, *March* 28, 1895.

J. E. Burke.

DEAR SIR: We have this day bought for your account and risk fifty shares Metropolitan Traction, price 93.

Respectfully yours, CRAWFORD & VALENTINE.

Mr. PENCE: Prior to your dealings with Crawford & Valentine did you know the firm of Jameson & Company?
A. I did.
Q. In what business were they engaged?
A. They were engaged in business as bankers and brokers.
Q. Where?
A. Here in this city.
Q. On January 29th, 1895, did Jameson & Company have any Metropolitan Traction stock belonging to you in their hands or under their control?
A. They did.
Q. How many shares?
A. 400—I mean three hundred shares of Metropolitan Traction stock, which they had purchased for me as my brokers.
Q. Through whom?
A. Through Hume & Clendenning.
Mr. BROWN: How many shares?

A. Three hundred. It was through Hume & Clendenning their correspondents at Philadelphia through whom or where the stock had been bought.

Mr. PENCE: It was held by them?

A. It was held by them.

Q. On January 29, 1895, did you have any transaction with Crawford & Valentine, the defendants, with reference to the
85 Metropolitan Traction stock, and if so state what the transactions were, and what conversations if any you had?

A. I did; on January 29th.

Q. Of what year?

A. On January 29th, 1895 I paid the defendants a thousand dollars as margins which they called for on two hundred shares of Metropolitan Traction stock.

Mr. BROWN: On how many shares?

A. On two hundred shares of Metropolitan Traction stock. After I paid the money and was about to leave the office Mr. Crawford said to me—came to me and said: "Aren't Jamieson & Company carryingsome Metropolitan Traction stock for you?" I said: "Yes; they are carrying 300 shares of Metropolitan Traction stock for me." He said: "Well, if you will have Jamieson & Company transfer or deliver that stock to us we will advance ten dollars a share or—I mean eighty dollars a share or $24,000 on the stock, and carry it for you." I said: "Very well, that would just suit me because I will then have all my Metropolitan Traction stock in the hands of one firm instead of having it at different places." I said to them: "How do you propose to manage it and make the transfer?" I said to him that that stock had been purchased by Jamieson & Company through their correspondents Huhn & Glendenning at Philadelphia, where the stock was then held, and I asked him how the arrangements could be made for the transfer. He said: "You go up to Jamieson & Company and tell them to telegraph to Huhn & Glendenning to deliver that stock for us to Toland Brothers
86 and Company our correspondents at Philadelphia, and they will advance the money—the $24,000 on the stock for us." I said: "Very well I will do so," and I immediately went up to the office of Jamieson & Company and had them telegraph to Philadelphia and had the stock transferred—I told the defendants I would go up there and have the transfer made as they suggested. I went up and had the stock and on the same day the defendants told me that the stock had been transferred all right.

Mr. PENCE: Did the defendants ever sell any Metropolitan Traction stock belonging to you on your order; and if so state when and the circumstances under which the sale was made?

A. They did. On the 28th day of January, 1894—1895—they sold one hundred shares of Metropolitan Traction stock for me on my order—I gave them an order. The order which I gave them for the sale of the stock was for three hundred shares but as a matter of fact they sold only one hundred shares belonging to me on that day. They reported to me on that date that they had sold

three hundred shares at 90⅛ but as a matter of fact they had only sold one hundred shares belonging to me. The other two hundred shares of the three hundred shares belonged to themselves; I had nothing to do with it. It wasn't mine.

Mr. BROWN: I object to the answer.

The WITNESS: Wait until I finish my answer.

Mr. PENCE: You may cross examine afterwards and bring out all the facts you wish.

87 Mr. BROWN: His statement is a conclusion of law.

Mr. PENCE: It is not; he states what he knows and you can cross examine him afterwards.

The WITNESS: That is the only sale of Metropolitan Traction stock that they ever made for me with my knowledge or on my order, or with my consent. I never knew that they had sold any Metropolitan Traction stock belonging to me except that one hundred shares until May 20, 1895. That is the first time I learned that they had sold a single share of Metropolitan Traction stock belonging to me with the exception of the one hundred shares I have just spoken of.

Q. What did they report to you that they had done touching this order?

A. They reported to me on January 28th that they had sold three hundred shares of Metropolitan Traction stock on my order at 90⅛.

Mr. VROOMAN: January 20?

A. January 28th.

Q. They reported they had sold three hundred?

A. On that day they reported to me that they had sold three hundred shares on my order at 90⅛.

Mr. PENCE: They never sold any other stock for you on your order, or with your consent?

A. No, sir; no other Metropolitan Traction stock.

Q. Did the defendants also give you written notice that they had sold 300 shares of Metropolitan Traction stock on January 28th, 1895?

A. They did.

Q. Have you got that notice?

A. Yes.

88 Q. Let me see it?

A. I now hand it to you.

Q. This is it?

A. Yes.

Mr. PENCE: I offer the same in evidence and now read it into the record as follows:

CHICAGO, *January 28th*, 1895.

J. E. Burke, Esq.

DEAR SIR: We have this day sold for your account and risk 300 shares Metropolitan Traction stock at 90⅛.

Respectfully yours, CRAWFORD & VALENTINE.

Q. Did the defendants ever call upon you to pay to them and did you pay to them margins on any particular number of shares of Metropolitan Traction stock in controversy.

A. They did and I did.

Q. State at what time or times you were so called upon and also what amount of margins you paid and on what number of shares?

A. On December 20, 1894.

Q. I don't know whether these gentlemen will object to your looking at memorandums?

Mr. BROWN: Not the slightest.

A. December 20, 1894 and on January 11, 1895, and on January 25, 1895 the defendants called upon me to pay them two thousand dollars as margins on each of those dates on 500 shares of Metropolitan Traction stock; and I paid it.

Q. What did you do?

89 A. On each of those dates I paid them two thousand dollars and that made three payments or six thousand dollars that I paid on them.

Q. Paid for what purpose?

A. As margins on the five hundred shares of Metropolitan Traction stock.

Q. Then——

A. On January 29th, 1895 they called upon me to pay them a thousand dollars as margins on two hundred shares of Metropolitan Traction stock and I paid it; on April 1, 1895 the defendants called upon me to pay them thirty-eight hundred dollars as margins on five hundred and fifty shares of Metropolitan Traction stock.

Q. What did you do?

A. I paid it.

Q. Did you know one J. F. Kilgour?

A. Yes; I did.

Q. Who was he?

A. He was an employee in the defendant's office who superintended the business about the office, and acted apparently as the manager of their business in their office under their directions.

Q. With whom did you have your conversations about margins?

A. My conversations about margins I had with both Mr. Kilgour and with Mr. Crawford, and I think that I also talked with Mr. Valentine, one of the defendants in this case, with reference to margins—putting up margins, but of that I would not be absolutely positive. But the conversations about margins were had principally with Mr. Kilgour and Mr. Crawford.

Q. State the substance of what was said and state what was done at each of the times that you paid the defendants margins?

A. On December 20, 1894, and on January 11, 1895, and

90 on January 25, 1895 when I was called upon to put up two thousand dollars margins, on each of these occasions I had my conversations in regard to margins with Mr. Kilgour or with Mr. Crawford and I think with both of them, because whenever the subject of margins came up between us they were usually together.

On January 29th, 1895 when I paid the thousand dollars as margins I can't remember distinctly as to which of the defendants I had my talk with or whether it was with Mr. Kilgour, I could not say positively which one but I am inclined to think that it was either with Mr. Crawford or with Mr. Kilgour. On April 1, 1895 the conversation I had with the defendants with regard to margins was had with Mr. Crawford and with Mr. Kilgour, both of them.

Q. Now on the occasions referred to give the substance of the conversations with reference to margins?

A. On December 20, 1894 January 11, 1895 January 25, 1895, when I was called upon for margins by the defendants the substance of the conversations was this: that they called upon me or asked me for further margins on the Metropolitan Traction stock that they were holding for me and they spoke of the market declining, of the condition of the market and they stated to me the amount of money they would require on each of those occasions and on each of those occasions Mr. Kilgour, or Mr. Crawford I think it was on- of the two
91 on those three occasions I have just mentioned would figure out and make a computation of the amount of margins required on five hundred shares of Metropolitan Traction stock.

Q. On 500 shares?

A. On five hundred shares on those three occasions. Figured out on the counter, in each one of these instances.

Q. What rate of margin was required or what per cent.?

A. There was no particular amount ever required of me—no percentage, no particular per cent. was I ever called upon to pay except upon the first day of April, 1895 when they said they wanted ten point margins; that was the first time they ever asked me for a ten point margin. January 29th when I was called upon to pay one thousand dollars margins the computation was made on 200 shares and that was the amount they required me to put up as margin at that time. On April 1, 1895 when I paid $3800 as margins—as I stated before the conversation was had with Mr. Crawford and with Mr. Kilgour, and as I said before they asked me to put up $3800. The way the conversation started then—the conversation was this: On that morning April 1, 1895 they handed me my monthly statement of account for the month preceding, that is for the month of March, 1895, and then asked me—there referred to the condition of the market and asked me to put up further margins on 550 shares of stock, Metropolitan Traction stock. I said to them that I was—that I didn't have much ready money then or words to that effect—I hadn't much spare finds just then, just at
92 that time, and I didn't see how I could put up further margins unless I could find somebody to assist me or unless I could borrow the money. Well, they said that unless I did put up further margins, that is further margin the stock, they would be compelled to sell it out. I said "Well I will see what I can do." I went immediately to the office of Mr. William Kent and requested Mr. Kent to assist me in the matter, and asked him to go with me up to the defendants' office and have a talk with them and

see what arrangement could be made. Mr. Kent did go up with me to their office and when we went in and the first thing I think that Mr. Kent did was to ask where Mr. Valentine was. Some one in the office, I don't remember now who, said that he was up on the floor of the stock exchange in the same building. Mr. Kent went up stairs—at least he went out of the office to go up stairs and when he returned he said that Mr. Valentine told him that I had fifty shares that I had bought only a few days before and that they were carrying for me now instead of five hundred shares five hundred and fifty shares of Metropolitan Traction stock. A conversation was then had between Mr. Kilgour, Mr. Crawford, Mr. Kent and myself. Mr. Crawford and Mr. Kilgour standing on the inside of the counter Mr. Kent and myself on the outside of the counter. Mr. Kent said to them—the first thing he did was to ask them how much Metropolitan Traction stock they were carrying for me and they replied that they were—Mr. Crawford replied that they
93 were carrying 550 shares of Metropolitan Traction stock and one hundred shares of Chesapeake and Ohio stock. Mr. Kent——

Q. What if anything did they say in that connection that they would do?

A. First Mr. Kent said—before Mr. Kent said what he would do, after stating what amount of stock they were carrying for me they said they wanted margins on it on account of the condition of the market, and unless the margins were paid they would have to sell the stock out. Mr. Kent then said: "I have come here to protect Mr. Burke's Metropolitan Traction stock," and he wanted to know how much they required. They said ten points. They ought to have ten points. ten dollars a share on the stock. I said right there: "In that connection I will put up five hundred dollars." "Of the amount required?" Mr. Kilgour then took a pencil and a piece of paper that lay upon the counter there and he entered upon the paper 550 shares of Metropolitan—he put down 500 and then made a computation of how much would be required in order to make a ten point margin, and how much would be required of Mr. Kent. It figured up to $3300 and he then said—or Mr. Crawford, I don't remember which one now distinctly——

Q. They were both right there together.

A. They were both there talking. The conversation was had between all of us standing there at the same time. They said: "But there is one hundred shares of Chesapeake and Ohio." that ought to be margined, Mr. Burke has 100 Chesapeake and Ohio with us that ought to be margined and Mr. Kent said: "I don't
94 know anything about that and I don't care anything about that; and I won't have anything to do with Chesapeake and Ohio. I come here to protect the Metropolitan Traction stock and the Chesapeake and Ohio I won't have anything to do with." I then gave an order right there to sell out the 100 shares of Chesapeake and Ohio at once. It was sold and the sale reported to me that day.

Q. What did Kent do then.

A. Mr. Kent then gave them his check for $3800 and I paid them 500 and that made the $3800 that was paid to them as margins on 550 shares of Metropolitan Traction stock on that day.

Q. Did Mr. Kent say anything to them after paying it or at the time of paying it——

A. Before he paid——

Mr. BROWN: Is that your question?

Mr. PENCE: Did he say anything in regard to what he wanted and what was the distinct understanding with him?

A. I understood—he said at that time before he paid the money—"I want it distinctly understood that when Mr. Burke's account shows a margin in excess of the ten points on this Metropolitan Traction stock——

Q. That is ten dollars per share?

A. Ten dollars per share—"when Mr. Burke's account shows margins more than ten dollars per share on this Metropolitan Traction stock then——

Q. That is above the market price?

A. Above the market price—yes; "then out of those margins, out of that excess I shall be paid."

Q. Over ten dollars a share.

95 A. Yes; when it goes up to $3300, that I shall be paid that back, and it was assented to by them and there was an order—I then and there wrote out an order to that effect and signed it and left it in the defendant's office.

Q. That is that they pay Kent $3300——

A. That they pay Kent out of the excess above ten per cent. up to $3300——

Mr. VROOMAN: I was going to suggest that if that order was here we could tell better by that what it contains.

The WITNESS: You had the order at the last trial of the case.

Mr. VROOMAN: It is attached to some deposition in the case here.

The WITNESS: There is no original attached that I know of.

Mr. BROWN: Is it not attached to Mr. Kent's deposition?

A. Not that I know of. No; a copy of it is attached.

Mr. VROOMAN: The original has been mislaid.

The WITNESS: There will be no question about that order.

Mr. PENCE: Was that money paid to Mr. Kent by the defendants on that order.

A. It was not.

The COURT: Go on.

A. On May 13, 1895 I was in the defendants' office and Mr. Crawford said to me—or Mr. Kilgour, I have forgotten which—that Mr. Kent had been to the office and wanted the money that he had put up for me and that they would rather not pay it to him unless I gave a new order, or words to that effect, and I then went down to Mr. Kent's office and made a computtation of the interest——

96 Q. Due to Mr. Kent?

A. I went to Mr. Kent's office and made a computation of the interest on $3300 from April 1,—the day that he let me have the money—up to that day May 13, 1895, interest at six per cent.—as I wanted to pay Mr. Kent not only the money that he paid for me but interest also—the first order was simply for the principal. The second order included the interest it figured up to $23.65, I think.

Q. Making a total of——

A. $3323.65.

Q. $3323.65—that was the second order?

A. That was the second order, yes, sir.

Q. Did the defendants give you written notice of——

Mr. BROWN: Was that order paid?

A. That was paid as I understand it, yes, sir.

Mr. VROOMAN: To Mr. Kent?

A. It was paid to Mr. Kent, yes, sir.

Mr. PENCE: Did the defendants give you written notice of the alleged sale of your hundred shares of Chesapeake and Ohio?

A. Yes.

Q. Have you that notice?

A. Yes; and I hand it to you.

Q. Is this that notice?

A. Yes.

Mr. PENCE: I offer it in evidence and read it in the record as follows:

CHICAGO, *April* 1, 1895.

J. E. Burke, Esq.

DEAR SIR: We have this day sold for your account and risk 100 shares, Chesapeake and Ohio price 17¾.

Respectfully yours, CRAWFORD & VALENTINE.

97 Q. Was the sale made in April 1895 as stated in the notice?

A. No, sir; it was not. It was made several months prior to that time. They didn't have any Chesapeake and Ohio at that time.

Mr. BROWN: What is the purpose of that. Has that anything to do with this case?

Mr. PENCE: Incidentally it has. But it is hardly necessary to go into an argument now and I will drop it for the present.

Mr. BROWN: I make a motion to strike that out. I object both to the question and the answer.

The COURT: Is there anything about the sale of Chesapeake and Ohio——

Mr. PENCE: It is the course of conduct, we have the right to other acts outside of the acts complained of to show fraudulent intention.

The COURT: The general course of dealing. Motion overruled.

To which ruling of the court counsel for the defendants then and there duly excepted.

Mr. PENCE: Do you know whether the defendants sold Metropolitan Traction stock which they were carrying for you and which is in controversy in this case?

A. Yes.

Q. Please state when they did so?

A. Please read that question again.

Q. Do you know whether or not the defendants sold Metropolitan Traction stock which they were carrying for you and which is in controversy in this case. If you do state when they did so?

A. I do. On October 24, 1894 they sold one hundred
98 shares of Chesapeake and Ohio stock belonging to me at 109¼ amounting to $10,925. On January 10, 1895——

Mr. BROWN: Are we not entitled to know how he knows?

Mr. PENCE: If he does not know they can quickly find it out on cross examination. He says he knows and it is competent.

Mr. BROWN: Is he competent to testify that he knows that they sold——

The COURT: Mr. Burke is a lawyer himself and I assume that he is testifying from personal knowledge.

The WITNESS: I will show my knowledge.

Mr. PENCE: You will have no trouble in finding out from this gentleman in regular course without interrupting him.

Mr. BROWN: I do not desire to interrupt him.

Mr. PENCE: I am not finding fault with you at all.

The WITNESS: On January 10, 1895 they sold one hundred shares of Metropolitan Traction stock belonging to me at 100¾ amounting to $10,075. On January 11, 1895 they sold two hundred shares of Metropolitan Traction stock belonging to me at 101½ amounting to $20,300. On January 28, 1895 they sold one hundred shares of Metropolitan Traction stock belonging to me at 90⅛ amounting to $9,012.50. On March 13, 1895 they sold three hundred shares of Metropolitan Traction stock belonging to me at 96⅞ amounting to $29,025; on April 16, 1895 the defendants sold 50 shares of Metropolitan Traction stock belonging to me at 89½ amounting to $4,475.

Q. What was the market price of Metropolitan Traction
99 stock on the dates you have just mentioned. You have given certain figures; was that the market price at that date?

A. I have given the figures at which they sold them.

The COURT: I have all of those totals except the 29th; how much was that?

A. $29,925.

Q. When was that sold?

A. That was sold March 13. The prices of Metropolitan Traction stock were as follows: July 1, 1894, 113⅛; October 24, 1894 the market price was 109⅜; on December 20, 1894 the market price was 104½; on January 1, 1895 the market price was 106. On January 10, 1895 the market price was 101½. On January 11, 1895 the market price was 101⅝. On January 25, 1895 the market price was 97½; on January 29th, 1895 the market price was 91¼. March 13,

1895 the market price was 96⅜. On April 16, 1895 the market price was 89¼.

Mr. PENCE: You did not state the price January 28, 1895.

A. I think I did, sir.

Q. No; not the 28th.

Mr. VROOMAN: What was it on the 29th?

A. 29th, 91¼.

Mr. PENCE: On each of these occasions when you paid the defendants money as margins on Metropolitan Traction stock do you know how many shares of Metropolitan Traction stock belonging to you they had on hand or were carrying for you at such times; if so state the number of shares?

A. I do. On December 20, 1894 when I paid the defendants two thousand dollars in margins they had on hand belonging to
100 me only 400 shares of Metropolitan Traction stock. On January 11, 1895 when I paid them $2000 margins on 500 shares of Metropolitan Traction stock they had only three hundred shares on hand belonging to me. On January 25, 1895 when I paid them two thousand dollars as margins on 500 shares of Metropolitan Traction stock they had on hand belonging to me only 100 shares of Metropolitan Traction stock. On January 29, 1895 when I paid the defendants one thousand dollars margins on two hundred shares of stock—Metropolitan Traction—they didn't have any Metropolitan Traction stock of mine on hand whatever. On April 1, 1895 when I paid them $3,800 margins on 550 shares of Metropolitan Traction stock they had on hand fifty shares only of Metropolitan Traction stock belonging to me.

Q. If the defendants sold your Metropolitan Traction stock as you say they did and had credited you at the time of sale with the proceeds or with the market value of the stock at such times how would your account with the defendants have stood on April 1, 1895 before you paid them the $3800 margins?

The COURT: If they had sold as they reported.

Mr. PENCE: If the defendants sold your Metropolitan Traction stock as you say they did and had credited you at the time of sale with the proceeds or market value of the stock at such times, how would your account with the defendants have stood April 1, 1895 before you paid them $3800 as margins?

Mr. VROOMAN: I don't quite understand that.

A. The fifty shares—this is on April 1?

The COURT: The day you paid the $3800.

101 Mr. PENCE: How would your account have stood if they had given you credit for the sales at the time they actually made them.

A. Fifty shares of Metropolitan Traction stock which they then had on hand belonging to me and the 100 shares of Chesapeake stock for which I gave order of sale on that day, would have been fully paid for and my account would have further shown a balance to my credit of——

526 *Dr.* JOHN E. BURKE

Date.				Price.		Amount.		
Sept.	29		Balance Long.....			52,609	19	
		500	Met. Trac. and 100 C. & O...					
Oct.	8	100	Sugar, etc.....	84¾		8,487	50	
	31		Interest			268	69	
						61,365	38	
Oct.	31		Balance.....			52,227	88	
		500	Met. and 100 C. & Ohio	On	hand			

526 *Dr.* JOHN E. BURKE

Date.				Price.	Amount.			Days.
Oct.	31		Balance Long.....		52	227	88	30
		500	Met. Trac. and 100 C. & Ohio					
Nov.	15	100	Sugar, 100 C. & Ohio..	87½	8	762	50	15
	23	100	" " "	87½	8	762	50	7
	30		Interest.....			263	95	
					70	016	83	
Nov.	30		Balance, Long.....		52	441	83	
		500	Met. Trac. and 100 C. & O.....					

CRAWFORD & VALENTINE.

JOHN E. BURKE — IN ACCOUNT WITH R. C. CRAWFORD. — *Cr.*

	Price.		Amount.	Days.	Interest.	Date.		Price.	Amount.	Days.	Interest.
ng.....			52,609 19	31	271 80	Oct. 2	Dividend 500 Met.....		625	29	3 02
. and 100 C.											
.....						4	100 Sugar S. Lc.....	85¼	8,512 50	23	32 62
....	84¾		8,487 50	23	32 53	31	Balance account and interest.		52,227 88		268 69
....			268 69								
			61,365 38		304 33				61,365 38		304 33
.....			52,227 88								
100 C. & Ohio	On	hand			E. & O. E.						

JOHN E. BURKE — IN ACCOUNT WITH CRAWFORD & VALENTINE. — *Cr.*

	Price.	Amount.	Days.	Interest.	Date.			Price.	Amount.	Days.	Interest.
ce Long.....		52 227 88	30	261 13	Nov.	16	100 Sugar, Lc.....	88⅛	8 800	14	20 53
. Trac. and 100 C. & Ohio						24	100 " "	87⅞	8 775	6	8 77
r, 100 C. & Ohio..	87½	8 762 50	15	21 90		30	Balance, interest.....				263 95
" "	87½	8 762 50	7	10 22			" account.....		52 441 83		
rest.....		263 95									
		70 016 83		293 25					70 016 83		293 25
nce, Long.....		52 441 83									
. Trac. and 100 C. O.....				E. & O.E.							

585 *Dr.* JOHN E. BURKE IN ACCOUNT WITH CRAWFORD & VALENTINE. *Cr.*

Date.				Amount.	Days.	Interest.	Date.			Price.	Amount.	Days.	Interest.
Nov.	30		Balance, Long.....	52 441 83	31	270 94	Dec.	20	Currency.....		2 000	11	3 66
		500	Met. Trac. 100 C. & Ohio.....										
Dec.	31		Interest.....	267 28					Balance account and interest.....		50 709 11		267 28
				52 709 11		270 94					52 709 11		270 94
			Balance.....	50 709 11									
		Long.	500 Met. Traction, 100 Ches. & Ohio.....					O. E.					

585 *Dr.* JOHN E. BURKE IN ACCOUNT WITH CRAWFORD & VALENTINE. *Cr.*

Date.				Price.	Amount.	Days.	Interest.	Date.			Price.	Amount.	Days.	Interest.
Dec.	31		Balance.....		50 709 11	31	218 32	Jan.	11	Check.....		2 000	20	5 55
		100	Ches. & Ohio.....						17	Div. 1¼ 500 Met.....		625	14	1 20
		500	Met. Trac.....						25	Check.....		2 000	6	1 66
Jan.	29	300	Met. Trac. Jamison & Co.....		24 000 00	2	6 67		28	300 Met. Trac.....	90⅛	27 000	3	11 25
	31		Interest.....		205 06				29	Check.....		1 000	2	27
									31	Balance account.....		42 289 17		
										" interest.....				205 06
					74 914 17		224 99					74 914 17		224 99
Jan.	31	100	Balance.....		42 289 17									
		500	Ches. & Ohio Com. on hand.....											
			Met. Trac. Com. on hand											

585 *Dr.* JOHN E. BURKE IN ACCOUNT WITH CRAWFORD & VALENTINE. *Cr.*

Date, 1895.				Price.	Amount.	Days.	Interest.	Date.				Price.	Amount.	Days.	Interest.
Jan.	31		Balance		42 289 17	28	164 45	Feby.	28		Balance account and interest		42 453 62		164 45
		500	Met. Trac. on hand												
Feby.	28		Interest		164 45										
					42 453 62		164 45						42 453 62		164 45
Feby.	28		Balance		42 453 62										
		500	Met. Trac. on hand												

585 *Dr.* JOHN E. BURKE IN ACCOUNT WITH CRAWFORD & VALENTINE. *Cr.*

Date 1895.				Price.	Amount.	Days.	Interest.	Date.				Price.	Amount.	Days.	Interest.
Feby.	28		Balance		42 453 62	31	182 77	Mar.	5	½	Profit 10 May. Wht		6 25	26	02
		500	Met. Trac. on hand								Balance account		47 288 30		
Mar.	28	50	" "	93	4 656 25	3	1 93				" interest				184 68
	30		Interest		184 68										
					47 294 55		184 70						47 294 55		184 70
Mar.	30		Balance		47 288 30										
		100	C. & O. on hand												
		550	Met. Trac												

Dr. J. E. BURKE IN ACCOUNT WITH CRAWFORD & VALENTINE. *Cr.*

Date.				Price.	Amount.	Days.	Interest.	Date.				Price.	Amount.	Days.	Interest.
Apl.	1		Balance		47 288 30	35	236 44	Apl.	1	100	C. & O	173¾	1 762 50	29	
		550	Met. Traction on hand								Ck. Wm. Kent		3 300	29	
		100	C. & O								" Jamieson & Co		500	29	26 87
	30		Interest		207 98				16		Div. 550 Met. Trac		687 50	14	1 59
									30		Balance account and interest		41 246 28		207 98
					47 496 28								47 496 28		236 44
Apl.	30		Balance		41 246 28										
		550	Met. Trac. on hand		E. & O. E.										

Q. I don't think you need stop now to give the exact figures but between what sums?

A. I will give it to you exactly in a moment.

The COURT: About five thousand dollars?

A. Between $5200 and $5300.

Mr. PENCE: $5397.58 wasn't — ?

A. That is correct.

Q. Of course a man can't carry all these amounts in his head. State whether or not the defendants rendered to you a monthly statement of account—every month—for the months of October, November, December, 1894, and January, February, March and April 1895?

A. They did.

Q. When were they rendered or handed to you?

A. They were handed to me on the first day of each month and purported to cover the transactions for the preceding month.

Q. If you have those accounts with you you may hand them to me.

A. I have them and here they are.

(Witness hands papers referred to to counsel.)

102 Mr. PENCE: I offer in evidence, and I will give your honor the substance of them and let the reporters copy them exactly from the document because it is a little difficult to read them in the record just as they are. I will offer them and read them into the record here as follows:

(Here insert monthly statements, "Exhibit 1.)

•

(Here follow facsimiles marked pp. 103, 104, 105, and 106.)

•

107 The COURT: What is long?

A. It is what they had on hand.

Q. You were long instead of short?

A. Yes sir.

Mr. PENCE: They claim that they had them on hand and we claim they did not, that they were sold.

The COURT: Then you were in debt on this first statement $52,227, is that it?

A. Yes sir.

Q. $52,441 on the second one?

A. According to the accounts rendered.

Q. $50,709 on the third?

A. Yes sir.

Q. $42,289 on the fourth?

A. Yes sir.

Mr. PENCE: It shows on the bottom on the left hand side how much they carried in each case.

The WITNESS: I received no credit for any of the sales except the 300 that they sold January the 28th.

Mr. PENCE: I want to show that these were the reports that were made and that they do not represent the true facts at all.

The WITNESS: Identify them by the month.

Mr. PENCE: I have given the dates already.

Q. On January 29th 1895 and on each of the occasions when you paid the defendants money as margin; what reliance, if any, did you place on the statements rendered to you and representations which you say they made to you with reference to Metropoli-

108 tan Traction stock and the number of shares of the same that they had on hand and were carrying for you?

A. I relied——

(Question read.)

Mr. BROWN: I object to that question.

Which objection was overruled by the court. To which ruling of the court counsel for defendants then and there duly excepted.

A. I relied upon the statements which they rendered to me and upon the representations.

The COURT: And believed them to be true.

A. Which they made to me and I believed them to be true otherwise I would not have paid them the money that I did as margins, or any of it, neither would I have turned over the 300 shares of Metropolitan—turned over to them the 300 shares of Metropolitan stock I had in the hands of Jamieson & Company.

Mr. PENCE:

Q. Were you in the defendants' office on May 20th, 1895?

A. I was.

Q. About what time of the day?

A. About 9 o'clock in the morning of that day.

Q. What is the first thing you did when you went there?
A. The first thing I did when I went there was to give an order to have the Metropolitan Traction stock which I supposed I had in Philadelphia in the hands of the correspondents of Crawford & Valentine, sent here from Philadelphia to be taken up and paid for here.
109
Q. How did you give the order?
A. I gave it verbally and also wrote out—I gave the order to an employee in the office and also wrote out an order upon Dick Brothers & Co. and upon Toland Brothers & Co., they were the correspondents of the defendants in Philadelphia, where I supposed the stock was.
Q. What did you do, you say you wrote out an order?
A. And handed it to an employee in the office to be forwarded to Philadelphia, those orders.
Q. Directed it to be sent to your account?
A. Directing the stock to be forwarded here, to be taken up here and paid for.
Q. Not in your own name?
A. No sir, I didn't sign the order, I wrote out the form of the order.

The COURT:

Q. In which office, Jamieson's office?
A. No, in Crawford & Valentine's office.

PENCE:

Q. What did you then do?
A. I went out of the office and returned in a few minutes and inquired——
Q. When you returned did you learn whether your orders had been sent?
A. I ascertained that they had not been sent.
Q. Did you learn why?
A. Yes sir.
Q. And what if any reasons were *were* given you?
A. The reason given was because the stock had been sold.
110
The COURT: Which stock are you speaking about now?
A. The Metropolitan Traction stock.
Q. The stock that you ordered purchased?
A. The stock that I supposed they had in their hands on that day.
Mr. PENCE: What was the condition of the business at that time?
A. The business was running as usual that day. I didn't see Mr. Valentine or Mr. Crawford there.
Q. Or Mr. Kilgore?
A. Or Mr. Kilgore either, neither of them there, but the other employés of the office were there and business seemed to be conducted as usual.
The COURT: What day was that?
A. On May 20th, 1895, the day when they suspended payment.

Mr. PENCE:

Q. When did you first learn that the defendants had suspended?

A. Between 11 and 12 o'clock on Monday morning the 20th day of May 1895.

Q. At the different times when you say the defendants sold your Metropolitan Traction stock, if you had been credited with the proceeds of the sale, or with the market value of the stock which you say these defendants sold, how would your account with the defendants stand on May 20th 1895?

A. My account would have shown a credit to me of $12,260.

Q. On or since May 20th 1895 has the defendants or either
111 of them paid you anything?

A. No sir, not a dollar.

Cross examination.

By Mr. BROWN:

Q. Mr. Burke, you knew the business of Crawford & Valentine, that they were stock brokers, did you not, during all these transactions?

A. I supposed them to be, yes sir.

Q. They were doing a stock brokerage business, were they not?

A. They advertised themselves as doing business as bankers and brokers and investors in securities.

Q. Did you know of their course of business between here and New York and here and Philadelphia, did you know of their having a private wire to Philadelphia and a private wire to New York?

A. I knew that they telegraphed orders to New York, I do not know that I knew that they had a private wire, I didn't know how they communicated, except by some wire, by telegram.

Q. Did you know where the Metropolitan Traction stock, the actual certificates of the Metropolitan Traction stock were dealt in—what markets they were dealt in particularly?

A. I suppose I did, yes.

Q. Where?

A. Philadelphia.

Q. Philadelphia and here?

A. Not upon the market here, I didn't understand it so.
112 That is on the stock exchange here, I never knew that they dealt in any Metropolitan Traction stock.

Q. You never saw a certificate of Metropolitan Traction stock, did you, here?

A. Yes sir.

Q. When?

A. I saw certificates two or three different times. Metropolitan Traction stock.

Q. Where?

A. Here, in this city.

Q. Here in Chicago?

A. Yes sir, here in Chicago, I saw them here.
Q. When?
A. Well, it was prior to my having any dealings with the defendants, some little short time prior.
Q. Where did you see them?
A. I saw them in Jamieson & Company's office here in the city.
Q. What was the par value of Metropolitan Traction stock?
A. $100 per share.
Q. You said that you were called upon to put up margins at different times?
A. Sir?
Q. You said that you were called upon to put up margins at different times?
A. Yes sir.
Q. What do you mean by that? What are margins?
A. I understood margins to be part payment upon the stocks and as securities for the brokers who were carrying the stocks for me.
113 Q. But they were not part payment on the stock if you had an agreement or arrangement with them that they were to pay back those margins if the stock went up?
A. I don't understand your question, Mr. Brown.
Q. These margins you were not only called upon to pay, but you expected to receive back any excess which their books showed them to be indebted to you over a certain margin of a certain number of points, did you not?
A. No sir, I did not.
Q. Was there ever any money paid by them back for margins except the money paid to Mr. Kent?
A. No sir.
Q. You say that you did not expect to receive back any money which you had paid in margins?
A. No sir.
Q. If the stock went up beyond a certain point?
A. No sir. I intended that all the money that I paid in should be applied in payment on the stock, I didn't intend to withdraw any moneys that I had paid them on the stock, I never intended to withdraw a cent of it.
Q. Did you ever know of any particular certificates of stock that were bought for you or on your account so that you could identify them?
A. I was never told the numbers of any certificates of stock that were purchased for me and consequently I didn't have any knowledge on that point as to the number or date of the certificate.
Q. You knew through whom Crawford & Valentine were dealing in Philadelphia, did you not?
A. I did, yes sir.
114 Q. Who were they dealing through?
A. They were dealing first through Dick Brothers & Co. and afterwards I learned that they were dealing through Toland Broth-

ers & Company of Philadelphia—with both Dick Brothers & Company and Toland Brothers & Co. after some time in January when I learned it, that they were dealing through those firms as their correspondents in Philadelphia.

Q. Now when you knew that you ordered Metropolitan Traction stock bought—you knew that when you ordered or instructed Crawford & Valentine to buy any Metropolitan Traction stock for you that the course of business was that they ordered Dick Brothers & Co. to buy for them in Philadelphia, did you not?

A. I supposed, as a matter of course that they would buy the stock through Dick Brothers & Company who were their correspondents there.

Q. But you knew the course of business, you knew that they would order that stock bought through Dick Brothers & Co. and carried for their, Crawford & Valentine's account, with Dick Brothers' account did you not?

A. I suppose so, yes, unless they ordered the stock when bought for me to be sent here to Chicago.

Q. That is not the question: You knew that the regular course of business did not involve their sending that stock to Chicago did you not—Dick Brothers—you knew that it involved merely the purchase in Philadelphia by Dick Brothers for the account of
115 Crawford & Valentine of certain stock?

A. I knew that it also involved more, Mr. Brown.

Q. I am not asking you that. You knew that was the course of business—you knew it did not involve the sending of that stock to Chicago in the course of business which they were conducting?

A. I didn't know whether in the course of business that stock would be kept there or sent here, but I supposed it would be kept there until it was ordered here.

Q. That is enough. Now, Mr. Burke, you knew, also, that it was kept—that the account of Crawford & Valentine—that your name and the name of no other customer of Crawford & Valentine was given to Dick Bros. or Toland & Co. when the stock was bought, did you not?

A. I didn't understand that my name would be given either to Toland Brothers or Dick Brothers & Company.

Q. You knew that the course of business would prevent that, didn't you—that that was not in the course of business?

A. So far as the course of business was concerned I cannot say that I knew very much about it, except that I did not expect that that would be done, that my name would be given. I think that answers your question.

Q. Hadn't you been dealing in stocks a good deal, speculating in stocks a good deal?

A. Not a great deal no sir.

Q. These accounts show sugar stock, don't they?
116 A. Yes, the accounts are there.

Q. To a very considerable extent, and Chesapeake & Ohio. Were you dealing in wheat with these gentlemen?

A. Not that I remember of.

Q. You also had been dealing through other stock brokers and you were acquainted with the general business of the stock markets, the course of business between here and New York and Philadelphia on the part of stock brokers?

A. I can't say that I was.

Q. You had been dealing through Jamieson & Company?

A. I had dealt through Jamieson & Company.

Q. And no other stock brokers here?

A. I think not.

Q. For how long had you been dealing in stock?

A. Crawford & McAvoy——

Q. Crawford & McAvoy, Crawford & Valentine and Jamieson & Company. For how long before 1895 had you been dealing in stocks, if at all, this way?

A. Oh, perhaps a year and a half that I had dealt some in stocks.

Q. Now, Mr. Burke, you knew, did you not that if Crawford & Valentine had been ordered by a customer to sell stock in Philadelphia, Metropolitan Traction stock in Philadelphia to some other customer, that they could and would in the ordinary and general course of business, have ordered that stock sold through Dick Brothers & Company in Philadelphia whether or not it had been purchased by that same customer for their account,
117 did you not?

A. (No answer.)

Q. You knew, in other words, that in the general course of business customers of Crawford & Valentine might order them to sell Metropolitan Traction stock short, as it is called?

A. I suppose they could have done so, yes.

Q. You knew that if Metropolitan Traction stock was ordered sold short by, we will say, Mr. Pullman, or Mr. Yerkes through Crawford & Valentine, that their method of doing it would be to order Dick Brothers & Company of Philadelphia to sell so many shares of Metropolitan Traction stock for their, Crawford & Valentine's account, wouldn't it?

A. I suppose so.

Q. Now in such a case supposing that you, Mr. Burke, had ordered 500 shares bought and Crawford & Valentine had ordered Dick Brothers & Company in compliance with that order to buy 500 shares Metropolitan Traction stock for the account of Crawford & Valentine, and Mr. Yerkes had ordered Crawford & Valentine to sell 500 shares of Metropolitan stock short, and they had ordered Dick Brothers & Company to do that, what would have been the result upon Crawford & Valentine's account with Dick Brothers & Company so far as the actual stock was concerned?

A. Now that is a very involved question.

(Question read.)

The COURT: Suppose they had an order to sell the same
118 day.

Mr. BROWN: From the different people. What would be

the effect as to the account between Crawford & Valentine and Dick Brothers & Company, and what would be the effect upon Dick Brothers & Company having any actual stock in their hands for the account of Crawford & Valentine?

Mr. MORAN: What difference does it make?

Mr. BROWN: Examine the accounts and you will know.

Mr. MORAN: That is not cross examination.

Mr. BROWN: You suggested that the general course of business was proper. I wish to prove that it was a contractual relation; we have a right to show on cross examination that it was a contractual relation.

Mr. MORAN: Between whom?

Mr. BROWN: Between Mr. Burke and Crawford & Valentine.

Objection overruled; exception by counsel for plaintiff.

Q. (Question read)?

A. I can't say, I don't know.

Mr. BROWN:

Q. Can you judge from your knowledge of stock brokers?

Objected to. Objection sustained; exception by counsel for defendants.

Q. Did you order any Chesapeake & Ohio stock sold before the order which you gave upon April 1st 1895, by these defendants?

A. Did I?

119 Q. Did you order these defendants to sell any Chesapeake & Ohio stock on your account before your order upon April 1st, 1895?

A. Before my order upon April 1st 1895——

Q. Yes, to sell it? You said you gave them orders on April 1st 1895 to sell 100 shares?

A. Yes sir.

Q. Had you ever given them any orders before that to sell for your account Chesapeake & Ohio stock?

A. No sir.

Q. Did you ever order sugar stock by them to be sold short?

Mr. PENCE; I object to that.

The COURT: How is it relevant?

Mr. BROWN: I wish to show your honor that Mr. Burke who says he doesn't know what the result would have been of a very plain transaction in Philadelphia, hadn't only ordered stock, as he would now have it made appear, for investment—and sold stock—ordered stock sold, but that he was dealing as other people in stocks, and that he ordered these gentlemen, Crawford & Valentine, to sell sugar stock short, stock that he didn't have at all, that that must have been a pure contractual relation that he entered into with them at that time in relation to that stock. That stock is included in the accounts in the other transactions which are the subject of

investigation here. If Mr. Burke ordered, for instance, 100 shares of sugar stock sold when he did not have and had never bought any stock, knowing that Crawford & Valentine was to buy that
120 in New York—if he did that it must appear that in doing that he was entering not upon what he calls a fiduciary relation with Crawford & Valentine by which they should buy and hold certain property for him, but a business relation with Crawford & Valentine by which so long as he indemnified them they could charge him with commissions for selling and he holding himself ready to deliver the stock if the purchaser called for it; it was a purely contractual relation.

The COURT: Do you contend that if he answered this question affirmatively showing that he had been dealing in stock, that these transactions in sugar stock would change the balance of the account?

Mr. BROWN: I am not expecting to change the figures of the account, what I wish to show is that the transactions between Mr. Burke and Crawford & Valentine, the general transactions—the general run of transactions were such as to show that when he made these orders to buy and sell Metropolitan Traction stock in Philadelphia, he was dealing with them in a purely contractual relation. I think that this throws light upon it because they were transactions at the same time, in the same general course of business, if I can show that he ordered sugar stock sold short there.

Which objection was sustained by the court. To which ruling of the court counsel for defendants then and there duly excepted.

121 The COURT: If he sold any of this stock short it is proper.
Mr. PENCE: He does not claim that your honor.

Mr. BROWN: Now, Mr. Burke, you say that you know that Crawford & Valentine sold your Metropolitan stock in Philadelphia. How do you know when they sold your Metropolitan stock in Philadelphia?

A. Through a personal examination of their books.

Q. Have you their books here?

A. Yes sir.

Q. Will you produce them?

A. I will.

Q. I should like to have you turn to the account by which you know—you may go on and do that now or if you will permit me I will ask you one other question. You say that at a certain time you ordered 300 shares of Metropolitan Traction stock sold. Do you know whether Crawford & Valentine were credited upon the books of Dick Brothers & Company at that time with 300 shares of Metropolitan Traction stock?

A. Yes sir, they were.

Q. And when you say that 200 shares were not yours but theirs, that you had nothing to do with it, how do you know that?

A. From their books.

Q. What do their books show about that, will you point it out?

A. Yes sir. Their books show that on that date they had only 100 shares belonging to me.

Q. How do their books show that?—do their books show
122 your account?

A. The account in Metropolitan Traction stock. They dealt entirely with Dick Brothers & Co. and Toland Bros. & Co. in Metropolitan Traction stock, they dealt nowhere else, with no other persons, they had no other accounts with any other persons in Metropolitan Traction stock. Those accounts show that on the 28th day of January 1895 that they had sold all my Metropolitan Traction stock with the exception of 100 shares.

Q. Why do you say that they had sold your Metropolitan Traction stock?

A. Their books, Mr. Brown, show this——

Q. I know perfectly well what the fact is here. Why do you say that they had sold your Metropolitan Traction stock?

A. Simply because I say their books show it, and I will tell you how they show it if you will allow me.

Q. Go on?

A. Now on the 24th day of October 1894 they were carrying for me 500 shares of Metropolitan Traction stock. On the 24th day of October they sold 100 shares of Metropolitan Traction but not on my order.

Q. Not on your order?

A. They sold that and that stock then—that was in the hands of Dick Brothers & Co., the 500 shares, when they sold the 100 shares the 100 shares were taken out of that, delivered out of that stock, so that Dick Brothers & Co. then held, after the sale of October 24th—held only 400 shares for——

Mr. PENCE: All acounts?

123 A. For Crawford & Valentine. I say that was a sale of my stock, when they sold that stock and delivered 100 shares of the 500 which they had for me that left only 400 for me. Now do you understand that, Mr. Brown?

Mr. BROWN:

Q. I understand it perfectly. We have been all through this, Mr. Burke, in Philadelphia. What you mean is this: That at a certain time Crawford & Valentine without your order ordered Dick Brothers & Company to sell a certain number of shares of Metropolitan Traction stock?

A. Yes sir.

Q. And that they afterwards, within two or three days, ordered Dick Brothers & Company to buy Metropolitan Traction stock also not on your order, do you not?

A. Yes.

Q. And when you ordered them to sell 300 shares of Metropolitan Traction stock they had—Dick Brothers had credited to Crawford & Valentine more than 300 shares?

A. That is right.

Q. Of Metropolitan Traction stock?

A. Yes, but not belonging to me.

Q. Wait a minute. But there was a space of 24 or 48 hours in which Dick Brothers & Co. were not carrying on their books a credit to Crawford & Valentine of but 100 shares of Metropolitan Traction Company stock?

A. A longer space than that—a little longer, I don't know how long.

124 Q. How much longer? It was a day or two wasn't —?

A. Several days.

Q. Now, Mr. Burke, your estimate of your damages here the difference between the amount which you figure, some $12,000 and the amount which the books of Crawford & Valentine which you say are here show they are indebted to you about—something less than $8,000 is due entirely, isn't it, to the fact that you hold that when you ordered those 300 shares sold they didn't have but 100 of your stock to sell?

A. No sir, not exactly, you don't understand it. The difference between what I claim was due me on the 20th of May 1895 and what appeared to be due me on May 20th 1895 from their books is this—accounted for in this way: I claim that I am entitled when they sold my stock—I am entitled to the market price of that stock as one of the measures of damages.

Q. I understand that, Mr. Burke.

A. Now they sold, for instance, on October 24th——

Q. Now stop right here.

Mr. PENCE: I insist he shall finish his answer.

The COURT: Let him go on and explain his theory.

A. When they sold 100 shares of Metropolitan Traction stock on October 24th 1894 and delivered that stock they then had on hand only 400 shares. Now that was without my knowledge or

125 consent. I claim that I am entitled to damages on account of that sale because it was not with my knowledge or consent, it was unknown to me, and the measure of damages I claim to be the market value of that stock at that time which was, we will say, 109¼. Now when on May 20th—when they suspended their books showed—it appeared upon their books that they were carrying for me 550 shares of stock which was closed out by the receiver by simply an entry on the books of that amount of the market price of that stock on that day, which was 95—the market price on that day was 95; the receiver credited me with 95 cents on the dollar and that made for the 550 shares seven thousand five hundred and some odd dollars.

Mr. PENCE:

Q. While they had sold it for a great deal more?

A. When they had appropriated that stock to their own use the stock was of great deal higher market value, that is our theory.

Mr. BROWN: Now you will attend to the question I asked you?

A. I will try to, Mr. Brown.

Q. Wouldn't that difference be almost entirely accounted for by your claim that when you ordered 300 shares of Metropolitan Traction stock sold in Philadelphia and when Crawford & Valentine sold 300 shares in Philadelphia and credited you with the results, you claim they had but 100 to sell and that the 200 shares
126 were their own and repudiated that part of the transaction, wouldn't that largely account for the difference?

A. It would account to some extent.

Q. Several thousand dollars, wouldn't it?

A. I can't say without figuring.

Q. You are not prepared to say it would not make a difference of several thousand dollars?

A. (No answer.)

Recess to 2 o'clock p. m.

Court met at 2 o'clock p. m.

JOHN E. BURKE, on the stand:

Cross examination resumed by Mr. BROWN:

Q. I understood, Mr. Burke, that you said it would show from the books of Crawford & Valentine how it was that you knewn when yourn stock, your particular Metropolitan stock was sold in Philadelphia?

A. Yes sir.

Q. And you have the books here?

A. I have a book here, yes sir, I have the ledger of the defendants I should say.

Q. I will ask you before you look at it to answer me this: Do you know of Crawford & Valentine selling or buying Metropolitan Traction stock upon their own account in Philadelphia?

A. No sir.

127 Q. Never at any time?

A. No sir, I never knew that they had bought or sold a share of Metropolitan Traction stock on their own account until the 20th—after the 20th of May.

Q. I say do you know now?

A. I do.

Q. That they did?

A. I do.

Q. Do you know when they bought or sold Metropolitan?

A. Yes sir.

Q. When?

A. I can take it right from the books.

Q. Wait a minute. You can tell that from the books, can't you?

A. I can tell from the books, yes.

Q. Now did you have a conversation with Mr. Crawford at any

time after he had returned from Philadelphia concerning prospects of Metropolitan Traction stock?

A. I did.

Q. What was that conversation?

A. Sir?

Q. What was that conversation?

A. I don't understand that to be cross examination.

Q. You object to answering it, do you?

A. I sha'n't object unless my attorneys do.

Q. I will ask you then—I should think it was proper cross examination, myself Mr. Burke, but I will call your attention more particularly. Did Mr. Crawford tell you upon returning from Philadelphia that the people in the East and that he himself were feeling bearish about Metropolitan Traction stock?

Objected to.

128 THE COURT: It is not cross examination.

Mr. BROWN: I wish to show, your honor, that Mr. Crawford—leading up to the question which I wish to ask Mr. Burke, whether Mr. Crawford did not tell him that he had sold himself for his own account Metropolitan Traction?

(Question read.)

A. At what time?

Q. At any time after he returned from Philadelphia—had lately returned from Philadelphia?

A. He told me a part of that—a part.

Q. What?

A. I can say yes to a part of your question.

Q. Well, what part?

A. That he felt bearish.

Q. That he felt bearish?

A. That he felt bearish.

Q. Did he advise you then to sell?

A. He did not, sir.

Q. Did he say anything to you about your selling or ordering sold stock?

A. Not a word, sir.

Q. Didn't Mr. Crawford at that time tell you that he himself, or that the firm of Crawford & Valentine had sold Metropolitan—was short of Metropolitan Traction stock in Philadelphia?

A. No sir.

Q. He did not?

A. No sir.

Q. You are sure?

A. I have said it as emphatically as I know how.

Q. Now will you turn to the books, Mr. Burke—first, as I understand you you had never been in possession of any evidence of the ownership of any of this Metropolitan stock yourself per-

129 sonally?

A. In the possession of the ownership?
Q. Of the evidence of ownership of it, I said?
A. Do you mean the certificates of stock?
Q. Yes?
A. No sir, I didn't have them in my manual possession.
Q. And you knew that Crawford & Valentine hadn't them in their manual possession, did you not?
A. I did not, sir.
Q. Didn't you know that the stock had been bought in Philadelphia and carried for the account of Crawford & Valentine there, didn't you say so?
A. That is what I supposed.
Q. You supposed that they hadn't then in their manual possession any stock certificates?
A. Stock belonging to me, I supposed that they didn't have them in their manual possession.
Q. And they could not, in the general course of business, without payment in full of the amount due upon it?
A. That strikes me as argument.
Q. Could they in the general course of business, in the regular course of business which you know about?
A. I don't know what you call general course of business.
Q. In the course of business of stock brokers which you knew of as carried on here in Chicago and Philadelphia—between Chicago and Philadelphia in relation to Metropolitan Traction stock?
130 A. I know that if it was in the possession of their correspondents in Philadelphia that it would not be in their possession, and I knew, or supposed that so far as my dealings with the defendants were concerned that the stock that they had purchased for me through their correspondents remained in Philadelphia.
Q. And that in the regular course of business it would not come in the possession of Crawford & Valentine unless the full value of it was paid to Dick Brothers & Company, did you not?
A. I don't know what you call the regular course of business any more than what I have said.
Q. You had no reason to suppose that it could come in their possession until the full value of it was paid, did you?
A. I didn't believe that it came into their manual possession, I believed that it remained in Philadelphia and therefore I do not see how I would have reason to believe otherwise.
Q. That is not the question?
A. You asked me if I had any reason to believe that it was not——
Q. That it could come, not that it did come, that it could come in their possession, except upon payment of the entire value of it?
A. It might come in their possession without.
Q. I am asking you about the course of business?
A. No. You are asking me what could happen.
Q. I am asking you if you do not know that it could not come

in their possession in the regular course of business until the
131 price of the stock had been paid—the price at which it had been contracted to be bought.

A. Have you reference to the stock which they purchased for me?

Q. Yes, or any other stock?

A. I don't know what the regular course of business was with other stock so far as they were concerned.

Q. Well, that stock purchased for you then?

A. As I stated to you, Mr. Brown, before, I did not expect that that stock was here, I expected that that stock was held—was in the hands of the correspondents of Crawford & Valentine.

Q. For what purpose—why?

A. To hold until they gave orders to have it disposed of, or sent here to be taken up and paid for.

Q. Didn't you understand that in the regular course of business that it could not be sent here until it was paid for?

A. Well, I did not suppose that they would send it here unless it was paid for, or unless Crawford & Valentine should make some arrangement with their correspondents to send it on here without being paid for, which they might possibly do.

Q. You do not understand that to be the regular course of business, do you?

A. Now I don't know what the regular course of business is.

Q. You don't know what the regular course of business is?

132 A. I think I have answered the question.

The COURT: I think he has answered it two or three times.

Mr. BROWN:

Q. Now, Mr. Burke, you knew enough of the regular course of business to know that you could not expect to get that stock in your possession without paying for it, did you?

A. I know that I didn't expect to, what I could expect is another thing.

Q. And you claim that it was held in Philadelphia as collateral to the amount that Crawford & Valentine owed upon it?

A. I supposed it was, yes.

The COURT: There is no credit in this stockbroking business?

A. (No answer.)

Mr. BROWN:

Q. Will you please look into the book that you have—the ledger account, and point out how it is that you know that your stock was sold on a particular day?

A. I turn to the account of Dick Bros. & Co. of Philadelphia with the defendant as it appears upon the defendant's ledger on page 411.

Q. How is that account headed?

A. It is headed, "No. 2. Dick Brothers & Company, Philadelphia, Pennsylvania.

Q. Well go on?

A. I find that on the 2nd—there is an entry on the 2nd
133 day of July 1894 on the righthand side of the page, it says, "By balance $48,290.49." Immediately below that, under the same date the words, "Long 450 Met. Tr." which I understand to be Metropolitan Traction. Under date of August the 25th 1895 I find an entry——

Q. Are there intermediate entries?

A. For Metropolitan Traction it is simply by balance and interest——

Q. Speak a little louder?

A. I am speaking now of Metropolitan stock. I say under date of August 25th 1895 I find an entry on the credit side of the account 5 Metropolitan Traction at 118 amounting to $590.31.

Q. What does that entry mean?

A. As I understand it that entry is the purchase by Dick Brothers & Company for Crawford & Valentine and it is credited by Crawford & Valentine to Dick Brothers & Company. Is that correct, Mr. Crawford?

Mr. BROWN: He is not on the stand.

The WITNESS: Under the date of August 31st 1895 I find an entry of 10 Metropolitan—it is abbreviated here, "Met. Trac." and I will read it, "Metropolitan Traction at 117½, amounting to $1175.63.

Q. What does that mean?

A. I understand that to mean a purchase by the defendants through Dick Brothers & Company and that is a credit of the amount of the 10 shares purchased.

Q. Five or ten?

A. The first was five.

Q. Five shares?

A. Yes, sir, the other was ten shares—first five and
134 then ten.

Q. Are those claimed by you to be your shares?

A. No sir. I knew nothing about them.

Q. Then you don't know upon whose order those were bought?

A. I find from other entries in their books that they were bought for third parties, I think one of the parties was Emma F. Prentiss, I don't know whether both, I know one of them—I think so.

Q. Can you turn to that?

A. I haven't got their books here.

Q. Haven't you got their ledger account here?

A. Yes sir, I think so. I find that the five shares purchased on August the 25th was purchased for Emma F. or Emma J. or T. Prentiss as shown on page 47 of the defendants' cash book.

Q. Do you find anything ten shares?

A. I find on page 52 of the defendants' cash book that the ten shares purchased on August 31st was purchased for Emma F. Prentiss.

Q. How do you find they were purchased for Emma F. Prentiss, how do you make that out?

A. Because it is charged to her.

Q. What is charged to her, the stocks?
A. These stocks are charged to her on that day.
Q. On the cash book?
A. On the cash book and in her account on the ledger.
135 Q. You haven't shown her account on the ledger but I will admit that that is so shown?
A. Yes.
Q. Go on—I guess you better refer to the page of the ledger?
Mr. MORAN: He has.
Mr. PENCE: He gave the page of the ledger—he gave the page of the ledger when he first commenced speaking.
Mr. BROWN: Not the page of the Prentiss account.
The WITNESS: On page 516, Emma F. Prentiss' account with the defendants.
Q. Page 516 of the ledger?
A. On ledger page 516 in Emma F. Prentiss' account with the defendants I find that she is charged on August the 25th 1894 with 5 Metropolitan Traction at 118 making $592, and on the 31st day of August she is charged with ten shares of Metropolitan Traction at 117½ amounting to $1177.50.
Q. Isn't it just as well to refer from one page in the ledger to another without bringing in the cash book, wouldn't that show just as well?
A. I could not have told from the——
Q. No matter. I just wanted to save time?
A. Well I will make — as short as I can.
The COURT: You are through with those two items?
Mr. BROWN: With those two items. Now go on?
A. The next entry in the account of Dick Brothers & Company with the defendants is on September 10th 1894 showing a
136 purchase by Dick Brothers of ten shares of Metropolitan Traction at 118—the next entry that I find in the account of Dick Brothers & Company with the defendants is on September 10th, 1894.
Q. 1894?
A. Yes sir, which shows 15 shares Metropolitan Traction shipped, and the next entry——
Q. What does that refer to the Prentiss stock—is it shown on the ledger account of Mrs. Prentiss?
A. I will have to look at that.
Q. Won't you look at it?
A. (Witness refers to book.) I find in defendants' ledger in the account of Emma F. Prentiss that that stock was delivered on September the 1st and September the 8th.
Q. To Mrs. Prentiss, the ledger account would seem to show?
A. The ledger account would show that, yes.
Q. Go on?
A. On September 10th 1894 the account of Dick Bros. & Co. shows that they purchased ten—no, shipped—they were shipped that day, ten shares—the first was five, I think it was fifteen.

Q. It is fifteen. They purchased ten didn't they on September 10th?

A. They purchased ten on September 10th at 118, $1,180.62, and——

Q. Shipped it——

A. No.

Q. Dick Bros. & Co. purchased it for Crawford & Valentine?

A. Yes sir.

137 Q. And shipped it on the same day?

A. (No answer.)

The COURT: What does "shipped mean" the delivery of the stock.

Mr. BROWN: Send the certificates right here.

The WITNESS: The cash book also shows that Emma Prentiss was charged with 10 Metropolitan Traction stock on September 10th.

Q. Paid for it and it was delivered to her, that is what it shows?

A. The account shows for itself so far as payment is concerned. I do not see any payment here. When it was delivered to her I suppose she was charged with it—or when she purchased it she was charged with it.

Q. When it was delivered to her?

A. Well, there is——

Q. This is the account of Dick Brothers with Crawford & Valentine. It charges the stock to Crawford & Valentine——

A. Now the next item relating to Metropolitan Traction stock in the account of Dick Brothers with the defendant was on September 28th, which shows on that date Dick Bros. & Co. purchased 50 shares of Metropolitan Traction stock at 116½ amounting to $5,828.13.

Q. Now do you know how that stock came to be purchased?

A. Yes sir.

Q. How was it?

A. I gave an order to have it purchased.

Q. Will you turn to your account in that book?

A. Yes sir. (Witness refers to book.)

138 Q. On what page of that ledger is your account?

A. It commences on page 526.

Q. What other page is it continued to?

A. 585. In the account of John E. Burke the plaintiff in this case with the defendants, it is shown under the date of September 28th that there were 50 shares Metropolitan Traction stock purchased at 116½?

Mr. MORAN: That is in the defendants' ledger, what page, mention the page to save time?

A. I have, I said page 526 of the defendants' ledger.

Q. Of the defendants' ledger?

A. Yes sir.

Mr. BROWN:

Q. And you gave an order that day to purchase that?
A. I did, sir.
Q. Go on?
A. My impression is that I had an order in for some little time previous to that to purchase it when the stock reached that point. The account then—my account then showed that I had 500 shares of Metropolitan Traction stock with these defendants.
Q. How did it show that?
A. They received from Valentine & McAvoy 450 shares and the purchased 50 shares more for me and that would make 500 shares.
Q. Wouldn't that make 550?
A. No sir, I didn't say 550, I said 500. The next entry in
139 Dick Bros. account with the defendant in Metropolitan Traction stock is on the 24th day of October 1894, which shows that they sold 100 shares of Metropolitan Traction stock for 109¼ making $10,918.75.
Q. That means that Dick Bros. & Co. sold for Crawford & Valentine, does it?
A. Yes sir, I suppose so.
Q. Did you give them an order to sell at that time?
A. No sir.
Q. Do you say that upon that day they sold your stock?
A. I do, sir.
Q. Can you trace in this ledger any other entry concerning that stock?
A. Concerning this stock, concerning the 100 shares of Metropolitan Traction; you first asked me how I know that that was my stock?
Q. Yes?
A. Well, I know it because it was stock sold and delivered by Dick Brothers & Co. upon the order of the defendants, the defendants had 500 shares of stock with Dick Bros. & Co. upon that day belonging to me. They sold on October 24th 100 shares out of that 500 and delivered it.
Q. How do you know it was out of that 500?
A. Because it is in the book on your account which you kept—which the defendants kept with Dick Brothers & Company which shows that that 100 shares was taken out of the 500.
Q. How does it show that it was taken out of the 500?
140 A. Because afterwards you purchased on the 29th but not on my order 100 shares of Metropolitan Traction stock and then the balance which you had on hand on October 29th, according to your own books was only 500, therefore I say that the 100 shares which you sold on the 24th came out of the 500 and 100 was afterwards purchased on October 29th and after that purchase your account with Dick Bros. & Co. still showed that you only had 500 shares on hand.

Q. What reference is there under this date of October 24th in this ledger——

Mr. MORAN: To save time Mr. Brown—do you say Mr. Burke, that 100 shares sold at that date shows that it was delivered?

A. I say the account shows that it was taken out of the account.

Mr. BROWN: It doesn't show delivery at all.

The WITNESS: It shows that it was taken out of the account.

The COURT: It means that it was credited to the Chicago firm and charged up against the other, is that it?

Mr. BROWN: Yes.

Q. What is there in the ledger with reference to that entry "100 Metropolitan Traction 109¼."

The COURT: Say who that was charged up to.

A. That is on page 101 of the cash book.

141 The COURT:

Q. Who is that charged to?

Mr. BROWN: To Crawford & Valentine.

A. It was for your friend, Joe Wilkins, secretary of the stock exchange.

Mr. BROWN: There is no use of laughing about it.

The COURT: Joseph Wilkins?

A. J. R. Wilkins. That sale is credited to J. R. Wilkins on page 101 of the defendant's cash book.

Mr. BROWN:

Q. Will you now look at J. R. Wilkins' ledger account?

A. Oh yes, sir, (witness refers to book).

Mr. MORAN: What is that?

Mr. BROWN: 100 shares recorded sold short.

Mr. MORAN: That is what you say.

Mr. BROWN: That is the fact. Wilkins was a customer of Crawford and Valentine and ordered 100 shares of Metropolitan Traction sold short and it was sold short and bought in on October 29th and Mr. Burke makes $5000 out of the transaction he claims, that is the idea.

The WITNESS: Well if I were not a witness I could answer you. I find an entry in the account which now stands on the ledger James R. Watkins——

Mr. BROWN: Now it can be proven that when these books left Crawford & Valentine's hands and went into the hands of the receiver, the title & trust company, this account stood in the name of Joseph R. Wilkins. A little pen mark has been made
142 over the "i" in each case, which Mr. Crawford & Valentine, neither of them knew anything about. I do not think anybody disputes that. Will you admit that, or will we be obliged to prove it? Mr. Burke very naturally and justifiably, when these books were produced in the bankruptcy proceedings, supposed that there was something wrong, but it was just as much a surprise to

Crawford & Valentine as to anybody else, and it was to prove beyond all doubt that it was done by somebody in the Chicago Title & Trust Company.

Mr. MORAN: What difference does it make?

Mr. BROWN: It makes a good deal of difference because this was not their stock.

Mr. PENCE: You sold our stock and delivered it.

Mr. BROWN: We didn't deliver it.

Mr. PENCE: Well, you sold it.

Mr. BROWN: They sold short for Wilkins; they were not doing business alone for Burke.

The WITNESS: Now what is the question?

Q. You were just about——

Mr. MORAN: The general question is to show from the ledger how you know that they sold your stock.

Mr. BROWN: I am now asking you what you find in the ledger account which now stands in James R. Watkins?

A. Then you have abandoned the other question.

Q. No, in relation to 100 shares of stock which you have
143 just spoken of in connection with the cash book being sold on the 24th of October, what do you find there?

A. I find a credit entry on the defendant's ledger in the account as it now stands upon the ledger, of James R. Watkins on page 478, 100 shares of Metropolitan Traction at 109¼.

Q. What would that indicate?

A. It would indicate that they sold that stock for him.

Q. Exactly, now turn back to the Dick Brothers & Company?

A. I can't handle this book here.

Q. Turn back to Dick Bros. & Co.? the next transaction?

A. Just wait a moment, put your question and I will answer it.

Q. What is the next transaction after October 24th?

A. In Metropolitan Traction stock?

Q. In Metropolitan Traction Company stock?

A. Between Dick Bros. & Co. and the defendant?

Q. Yes, what is it?

A. The next transaction in Metropolitan Traction stock between the defendants and Dick Brothers & Company as appears upon the defendants' ledger is under date of October 29th 1895—1894, where Dick Brothers are credited with 100 shares of Metropolitan Traction at 109 amounting to $10,906.25.

Q. What would that indicate?

A. It would indicate that they had purchased for Crawford & Valentine that amount of stock on that day.

Q. And to what other entry in the ledger or cash book
144 does that refer?

A. It refers to the cash book page 105.

Q. Will you turn to that?

A. (Witness refers to book.) Now what is your question?

Q. Do you find that it refers to the Metropolitan Traction stock?

A. I find that on page 105 of the cash book—it is the cash book,

an entry of the purchase of 100 Metropolitan Traction stock for J. R. Wilkins.

Q. At 109?

A. 109.

Q. Does that refer to the ledger entry?

A. It does.

Q. What page?

A. A. 478. Now what?

Q. What entry do you find there—what page—what account is that?

A. Do you mean what corresponding entry?

Q. In the first place what account is page 478?

A. It is now in the names of James R. Watkins.

Q. What corresponding entry do you find?

A. In that account I find that under date of October 29th 1894 a charge for the purchase of 100 shares of Metropolitan Traction at 109.

Q. What would that indicate?

A. It would indicate that they had purchased for this party that number of shares.

Q. Don't all these entries concerning this 100 shares of the Metropolitan Traction in the ledger and in the cash book indicate that on October 24 Mr. Joseph R. Wilkins ordered Crawford & 145 Valentine to sell 100 shares of Metropolitan Traction short and upon the 29th of October ordered them to buy it in?

A. I can only state what I have already stated with reference to what the books show.

Q. You can't answer that question?

A. But it would indicate to my mind exactly what you have stated.

Q. Now, Mr. Burke, what date was that?

A. October 29th.

Q. At what?

A. 109. October 29th at 109¼.

Q. Now a considerable portion of the claim which you make is based on the further claim of yours that the 100 shares sold on the 24th of October were your shares and were sold at 109¼, isn't it?

A. Yes sir.

Q. A considerable portion of the claim because you—that is a larger price than was obtained when you ordered 300 shares sold, or any shares, isn't it—how much were the 300 shares sold at?

A. (No answer).

Q. How much was the 100 shares that you claim sold for?

A. 90⅛.

Mr. MORAN: He has not answered the question, he hasn't mentioned all the entries on that page.

Mr. BROWN: No, I am going on, I stopped right there to inquire about that.

Q. If you are to be credited with 109¼ for those 100 shares

of stock instead of 90⅛ as you are in the ledger account with
146 you in the books of the defendant-, you are entitled to just that much more than their books show now?

A. It seems to me that that goes without saying.

Q. Now go on. On October 29th is an entry here——

A. I prefer to state.

Q. I am cross examining?

A. You want me to state how I know and I am trying to do it if you will allow me.

Mr. BROWN: Now go on?

A. The next entry that I find in the account of defendants with Dick Bros. & Company with reference to Metropolitan Traction stock is under date of October 29th, it says balance 500 Metropolitan Traction $31,028.26.

Mr. BROWN: That does not show any transaction.

A. It shows the amount that they then had on hand for the defendants.

Q. In giving these transactions from the account of Dick Bros. & Company heretofore you have not mentioned the items of balance which was shown from time to time, have you?

The COURT: The balance of stock on hand.

Mr. BROWN: Balance of stock on hand, I would just as leave you would say it, only I want to show that you haven't followed that course heretofore?

A. On September—excuse me—on September the account of Dick Brothers & Company with the defendants shows——

Mr. PENCE: September when?

A. On the account of the defendants with Dick Brothers &
147 Company as shown by the defendants' ledger, it appears that on September the 29th they had a balance, Dick Brothers & Company had a balance of 500 shares of Metropolitan Traction stock on hand for the defendants.

Q. And upon August 31st what does it show?

A. The balance that they had on hand is not stated.

Q. It says "balance" don't it?

A. Balance, 15 Metropolitan——

Mr. BROWN: I think that is a mistake because the amount carried out you see——

The WITNESS. I think it is a mistake.

Q. Go on with the next transaction after October 29th as shown by these books?

A. In answer to this question of how I know that they sold my stock and when they sold it, I will say that the entry upon their books showing that they had in the hands of Dick Brothers & Company on October 29th 500 shares of Metropolitan Traction, that that was the number of shares they had on hand, and the fact that they purchased—the defendants purchased through Dick Bros. & Co. 100 shares on October 29th indicates, I think, very clearly that the 100

shares which they sold on October 24th they sold from my stock. It was taken out of—the account shows that it was taken out of the 500 shares which they then had on hand for the defendants.

Q. That is a matter of argument isn't it?

148 A. It is a matter that appears on the books.

Mr. MORAN: Inference.

Mr. BROWN: Inference! I should think so.

Q. Didn't you answer me this morning that you didn't know what the effect would be on the account between Crawford & Valentine and Dick Brothers & Company if persons ordered purchases from Crawford & Valentine and sales from Crawford & Valentine on the same day.

The COURT: The same hour of the same day?

Mr. BROWN: You said you didn't know what the effect of that would be?

A. I did — the course of business.

The COURT: The court will conclude that there would be practically the same charge on each side of the ledger.

Mr. BROWN:

Q. Do you know what the effect would be upon the account of Crawford & Valentine and Dick Brothers & Company provided that Crawford & Valentine had at the request of a customer ordered Dick Brothers & Company to purchase on the 24th of October, say 500 shares of a particular stock, and some other customer had ordered them upon the 29th of October to sell 500 shares short, and both orders had been carried out, do you know what the result would have been upon the account between Crawford & Valentine and Dick Brothers & Company?

149 A. As you state it I do not. I can explain if you wish my answer.

Q. I should like to have it?

A. My understand- is this: If Crawford & Valentine received from one customer an order to purchase 500 shares of a certain kind of stock—sent the order to their correspondent in New York or Philadelphia to purchase 500 shares of stock, and another customer at the same time——

Q. Or later?

A. Or later—well, on the same day, or substantially at the same time, gave an order to sell 500 shares of the same stock through the same brokers, if the first order—I understand the first order would be a purchase and that the brokers would purchase the stock if the second order to sell—if it was to be sold short they would sell that short but still hold the stock that they had purchased for the first customer.

Q. I am asking you what the account between Crawford & Valentine and Dick Brothers & Company would show upon the ledger of the two concerns?

A. I don't know. I don't know how they might keep their books in that respect.

Mr. PENCE: There is no such instance in the books anyway.

Mr. BROWN:

Q. Suppose the order for the sale was five days after the order for the purchase, would that make any difference, supposing that
150 the order for the sale was from another customer and was for a short sale?

A. If five days afterwards a customer gave an order for the sale of 500 shares of stock short and it was sent to the same broker my understanding is that it would be sold short and it would appear in the account between the parties as a short sale, if that was the instruction to the broker who finally executed the order, but that if the order was given by Crawford & Valentine to sell 500 shares of stock without reference to whether it was short or long, that the broker in New York or Philadelphia would understand that it was not a short sale and that he would sell the 500 shares of stock which he had purchased—which they had purchased five days previous to that time and that would wipe out that stock, that would be the end of it, there would be no more of that stock held by the broker. Now that is my understanding of it.

Q. Now go on with the next transaction, the next item?

A. Now the next item that I find from the account of Dick Brothers & Company with Crawford & Valentine is under date of December 31st, balance 500 Metropolitan Traction stock, on the credit side of the ledger.

Q. What does that indicate?

A. That indicates that Dick Brothers & Company were holding and carrying 500 shares of Metropolitan Traction stock for the defendants.

151 Q. Let me ask you between each month on this page, or at the end of each month the ledger account is balanced, isn't it?

A. Well, the account shows itself how it is balanced.

Q. The account is balanced, isn't it at the end of each month?

A. I can tell you just when it shows.

Q. Here it is Mr Burke?

A. Well, here on August 31st it seems to be balanced and on September 29th it seems to be balanced.

Q. On July 31st?

A. On July 31st it seems to be balanced, October 29th it seems to be balanced, that is not at the end of the month. You asked me at the end of the month. I can't read this here (indicating).

Q. When you say there was an entry December 31st, that is after the account is balanced and the new section opened, isn't it?

A. It is the commencement of the account for December as I understand it—no, for January.

Mr. MORAN: For January?

A. January. The next item that I find in this account of Dick

Brothers & Company with the defendants is under date of January 10th 1895, which shows a purchase of 200 shares of Metropolitan Traction at 100⅜ amounting to $20,137.50, and on the 11th——

Mr. BROWN: Let me ask you right there. Did you give an order to purchase Metropolitan Traction stock at that time?

A. No sir.

152 Q. What does that refer to, if anything, what page of the ledger?

A. There is no reference to any page of the cash book or ledger.

Q. Have you in your examination of these books found a corresponding entry upon this ledger to that entry of January 10th, 200 Metropolitan Traction at 100⅜?

A. I find an entry here.

Q. Where?

A. I find entries on January the 10th of the—did I say that was a purchase? That was a sale.

Q. I thought you were wrong?

A. That was a sale—that was a sale on January 10th.

Q. I thought you were wrong. Then the transaction that you spoke of last is as you find in the account of Dick Bros. & Co. on the ledger of the defendants, a sale of 200 shares of Metropolitan Traction at 100⅜ on January 10th for $20,137.50, is it?

A. I said that exactly.

Q. Have you found a corresponding entry in the ledger in relation to that under that date?

A. I have no reference—there is no reference here to any other account or any other book. I find in other accounts—in accounts in the ledger of a sale of 200 Metropolitan Traction on January 10th.

Q. Will you point that out to me?

153 Mr. MORAN: Let him get at the books if you want him to tell.

A. I find on page 166 of the cash book a sale of 200 shares of Metropolitan at 103 and a quarter and a charge——

Q. No, not a- 103 and a quarter?

A. One hundred and three quarters which is charged to D. B. & Company?

Mr. BROWN: Do you find the ledger account of that mentioned?

A. Ledger account 411.

Q. Look at it. Have you in your examination of the books, Mr. Burke, found in the ledger another entry on the other side under date of January 10th of 200 Metropolitan Traction at one hundred and three quarters, under stock and bonds for Crawford and Valentine or R. C. Crawford or any such account?

A. I have.

Q. Where?

A. I find in the account of R. C. Crawford, his New York account on page 225, I find an entry under date of January 8th of a sale—of a credit to him on a sale of 200 Metropolitan Traction of one hundred and three quarters.

Q. If an order was given by mail upon the 8th that would be about the time it was executed in Philadelphia, would it?

A. Well, that is——

Q. That is what you find do you?

A. I said so.

Q. What does it indicate upon the face of it.

A. It indicated that R. C. Crawford sold on that date——

Q. Crawford and Valentine sold for R. C. Crawford, isn't
154 that what it indicates?

A. It indicates that there was a sale for R. C. Crawford account of 200 shares of Metropolitan Traction, just as it states there.

Q. Go on and give the next item, about Metropolitan Traction? You have given that before, now I would like to call your attention to the next item. I will ask you whether that sale of 200 shares of Metropolitan stock, January 10th was ordered by you, whether it was a sale ordered by you?

A. It was not.

Q. When did you give the order for the sale of three hundred shares?

A. On January 28th, 1895?

Q. What is the next item?

A. The next item in the account of Dick Brothers & Company with the defendants is under date of Jan. 11, 1895 Two hundred shares of Metropolitan Traction, sold at one hundred and a half, $20,287.50.

Q. That indicates what?

A. That indicates that that amount of stock was sold on that day I suppose?

Q. And by Dick Brothers for Crawford and Valentine?

A. That is what it indicates as I understand it.

Q. Do you find a corresponding entry to that in the ledger account?

A. There is nothing to indicate in this account here, it does not refer to any other account.

Q. In your examination of the books you have found a similar entry have you not about that day?

A. Yes, sir.

Q. Where is it?

155 A. I find it both in the cash book and in the account of R. C. Crawford.

Q. What do you find in the account of R. C. Crawford.

A. In the account of R. C. Crawford, the New York account, I find an entry under date of January 11th 1895, credit 200 Metropolitan Traction stock, sold at one hundred and one and a half, $20,275.00.

Q. That would indicate that there was a sale for the account of R. C. Crawford for that amount of stock by Dick Brothers and Company or there was a sale in New York for that amount of stock——

A. No, not in New York.

Q. There was a sale of that amount of stock for R. C. Crawford by Crawford and Valentine wasn't there?

A. That would be my inference.

Q. Go on to the next item of Dick Brothers and Company. I will call your attention to the items of dividends.

A. The next entry referred to in the account of Dick Brothers and Company with the defendants is under date of January 16th which shows that there are—that Dick Brothers and Company are charged with a dividend of one quarter per cent. on 500 shares of the Metropolitan stock amounting to $625.00.

Q. That would mean that Dick Brothers and Company credited Crawford and Valentine with that amount, or that Crawford & Valentine at any rate charged Dick Brothers with that amount would it?

156 A. That is the way I look at it.

—. Could they charge Dick Brothers and Company with a dividend.

A. They charged Dick Bros. & Co. with a dividend.

Q. Now is there a cash book reference there,

A. No, sir.

Q. Will you look at the cash book and see if that is credited to you, or do you know—can you answer whether that is credited to you in your account, $625.00?

The COURT: What is the date?

Mr. BROWN: January 16th.

The COURT: J. E. Burke dividends a cent and a quarter on five hundred, six hundred and twenty five dollars.

Mr. MORAN: What is the page of the ledger.

The COURT: 585 is the page.

Mr. BROWN: That dividend which you say you were credited with which you should not have been?

A. We will come to all that. Under date of January 17th in the plaintiff's account in this case the plaintiff is credited with dividend of one and a quarter on five hundred Metropolitan Traction of $625.00

Q. What is the next item?

A. The next item in the account of Dick Brothers and Company with the defendants is under date of January 25th 1895.

Q. There are three entries under that date, are there not?

A. Of purchase—I mean of a purchase of three hundred and fifty shares of Metropolitan Traction stock, the first 150 purchased

157 at 98 the second 150 purchased at 97, the third or fifty at 96.

Q. Did that indicate that Dick Brothers and Company purchased for Crawford and Valentine three hundred and fifty shares on that date?

A. That is what I would understand from the aaccount.

Q. Is there any other corresponding entry to that in the ledger account, in the ledger account in these books?

A. I find in the account of R. C. Crawford——

Q. New York account?

A. New York account, under date of January 25th, 1895 a charg-

to him for the purchase of 350 shares of Metropolitan Traction stock.

Q. At the same prices?

A. Yes sir, that is right, at the same prices.

Q. What is the next item—you say that you did not order these 200 shares sold upon January 11th, nor did you order any shares bought on January 25th or about that time.

A. No sir.

Q. Those transaction- were under no order or instructions from you?

A. They were not on any order or instructions from me. The next item relating to Metropolitan Traction stock in the account of the defendants with Dick Brothers and Company is under date of January 26, which is showing a purchase—showing a sale of fifty shares of Metropolitan Traction at 94 and a quarter amounting to $4,709.37.

Q. Is there a sale on that same day?

158 A. There is another entry under same date of fifty Metropolitan Traction D. B. & Company, forty seven hundred dollars.

Q. What does that indicate?

A. That indicates to me that 50 shares were delivered by Dick Brothers and Company to Toland Bros. & Co. on that day.

Q. Did you find entries, corresponding entries or entries concerning Metropolitan Traction in this ledger account anywhere else upon this day corresponding to them?

A. Yes sir, I find in the account of Toland Brothers and Company of Philadelphia with the defendant company as appears upon the defendant's ledgers here, on page 416. I find under date of January 16 with To. and Brothers—January——

Q. January 26th?

A. I mean January 26th, an entry of 50 Metropolitan Traction stock, D. B. & Company $4700.

Q. Which do you refer that refers to, or which entry does that correspond with?

A. I find on the debtor side of that account under date of January 26th 50 Metropolitan Traction at ninety four and a quarter.

Q. What do those two items indicate upon their face.

A. It -ould indicate that they received—that Toland Brothers & Company received on the order of the defendants 50 shares of Metropolitan stock from Dick Brothers and Company at—at 94 and on the same day they *d* sold that fifty shares of Metropolitan Traction stock and aat 94 and a quarter.

Q. Which of the items does it correspond with in the ac-

159 count of Dick Brothers & Company.

A. As I have already said there is an entry in the account of Dick Brothers & Company under date of January 26th of 50 Metropolitan stock delivered to Toland Brothers and Company.

Q. That is right but you haven't stated whether you found an entry—a further entry which corresponds with this other purchase—

or sale of 50 of the Metropolitan Traction at 94 and a quarter on the same date.

A. I find an account of Dick Brothers and Company that on that date—in the account of Toland Brothers and Company with the defendants upon that day—on the 26th—on January 26th, Toland Brothers and Co., received from Dick Bros., and Co., on the order of the defendants, 50 shares of Metropolitan Traction at 94 and on the same d-y they sold the fifty shares at 94 and a quarter. Now those are the only transaction- on that day that was had with Toland Brothers and Company.

Q. But that does not refers then to this first item of the sale of 50 Metropolitan Traction at 94 and ¼, it refers to the second item which you read?

A. I understand Dick Bros. and Co., are charged on that day on the defendants' cash book with fi*fit* shares of Metropolitan Traction., at 94 and a quarter, that was the sale made by Toland Brothers and Company.

Q. Is not there a charge in R. C. Crawford's New York account showing a purchase?

160 A. You better let me go on and give them in their order.

Q. I am referring to this, R. C. Crawford's account, this is not Dick Bros. account I am referring to?

A. Don't mix the two accounts up.

Q. I haven't mixed them up. I am asking you if there is not a corresponding entry here of January 26th.

A. I can't say that there is a corresponding entry.

Q. But there is an entry?

A. I can say that there is an entry and the books show it.

Q. What is the entry?

A. There is an entry in R. C. Crawdorf's New York account on page 225 of—under date of January 26th a credit for the sale of 100 shares of Metropolitan Traction at 94 and a quarter.

Q. Indicating on the face that Crawford and Valentine sold for R. C. Crawford that amount on that day?

A. That is the way it would indicate to me.

Mr. MORAN: R. C. Crawford, the defendant here.

A. He is one of the defendants.

Mr. BROWN: Certainly he is one of the defendants.

The WITNESS: Now the next item relating to Metropolitan stock in the account of Dick Brothers and Company with the defendants is under date of January 28th, I find an entry of a sale of 300 shares of Metropolitan Traction at 90 and ⅛ amount to $27018.75.

The COURT: That is on your order?

A. That is when I ordere*f* it, that is the day*e* I gave the order to sell 300 shares.

Mr. BROWN: Mr. Burke claims that only 100 of those that

161 were sold were his?

A. That is right.

Mr. BROWN: It is perfectly understood between us but the account shows that 300 shares were sold at that date of Metropolitan stock.

The WITNESS: Yes, the account shows it, I said that.

Q. Now will you look at the entry in your account under January 28th, or will you state if that is credited to you in your account with Crawford and Valentine upon January 28th?

A. Yes sir it is.

Mr. VROOMAN: Let us get that account.

Mr. BROWN: He has put it in here several times.

Mr. MORAN: He says it is credited to him.

The WITNESS: There is no question about it. Now the next item——

Mr. BROWN: Where is your account in this ledger, what page?

Mr. MORAN: 585 isn't it?

Mr. BROWN: 585.

The COURT: 526 and 585.

The WITNESS: 585 is the last.

Mr. BROWN: You find in that account a credit of that item?

A. I find under date of January 28th a credit of the sale of three hundred shares. of Metropolitan Traction at 90⅛ amounting to $27,000. credit to my account.

Q. That was about the lowest point that the Metropolitan
162 Traction reached, was it?

A. Yes sir.

Q. It was lower considerably than the amount at which the stock was sold which is charged in this ledger account of R. C. Crawford's New York account as having been sold upon the prior dates in January, wasn't it?

A. Your question is a little involved for me to answer.

Q. The accounts of sales for the account of R. C. Crawford's New York account upon January 10th, 11th, and 26th,——

Mr. PENCE: The testimony already shows that.

Mr. BROWN: Are at higher figures are they not, than the sales——

Mr. MORAN: He has given the figures, Mr. Brown.

The WITNESS: Under date—the next item in the account of Dick Brothers and Company with the defendants as appears on the ledger is under date of February 4th, in which it appears that there was a sale of fifty shares of Metropolitan stock at one hundred and a sale of fifty shares of Metropolitan Traction stock at 99.

Mr. MORAN: You said a sale in both instances?

A. A purchase and sale of 50 shares upon that day.

Mr. VROOMAN: Febriary 4th or February 2nd?

A. February 4th as it appears on this date—as it appears on this ledger.

Mr. BROWN: A purchase at 99 and a sale at a 100?

A. Yes sir.

163 Q. Are there any other items in the ledger referring to the purchase and sale of 50 shares of Metropolitan Traction stock on that day?

A. I find on the cashbook of the defendants at page 181 a purchase of 50 shares of Metropolitan Traction at 99, and on the same

date a sale as appears by the cash book of fifty shares of Metropolitan stock at the same figure.

Mr. VRONAM: That sale is at a hundred isn't it?

Mr. BROWN: In what ledger account does it show?

A. It shows in the ledger account of stocks and bonds, of the defendant's ledger, page 394.

Q. '94 or '92?

A. 394 the stock and bond account commences on 392 and it is on 394, a purchase of fifty shares of Metropolitan Traction at 99, and on the credit side of the account I find a sale of 100 Metropolitan Traction stock at one hundred and a quarter and fifty Metropolitan Traction at 100.

Q. Now what does that indicate on the face of it?

A. It indicates that the stock which I have just mentioned was bought and sold as it appears here upon the account.

Q. For the account of?

A. For the account of stocks and bonds.

Q. What does that indicate, stocks and bonds?

A. I understand stocks and bond represented Crawford and Valentine?

164 Q. It could not be anybody else?

A. House account.

Q. It is house account?

A. Yes sir.

Q. You made no order for sale of stock that day?

A. No, sir. The next item relating to Metropolitan Traction in the account of Dick Brothers and Company with the defendant is on March the 13th 1895 wh-ch shows——

Q. Sale, isn't it?

A. A sale of fifty Metropolitan Traction at 96 and three quarters.

Q. Do you find a corresponding ledger entry to that account?

A. There is nothing here to show it.

Q. There is nothing to show it there, but have you found one?

A. Under that date?

Q. Do you find any entry under that date?

A. Of that fifty shares, I do not know.

Q. Do you find any entry of sale?

A. I find in the cash book an entry on page 204 of a sale of fifty shares of Metropolitan at 96 and three quarters.

Mr. MORAN: What is the date, Mr. Burke?

A. March 13th.

Mr. BROWN: To what ledger account does that refer?

Mr. MORAN: That was a sale.

Mr. BROWN: Yes, that was a sale.

A. That refers to a sale ledger account 204, Dick Brothers and Company.

Q. Dies it refer to the R. C. Crawford New York account?

A. Well, I can't go through with these books with these gentlemen here. I must have access to the books so when a question is asked——

165 The COURT: Go on with another question.

Mr. BROWN: Will you look at the cash book and see if there is a reference to the ledger page?

A. Of that fifty shares?

Q. Any number of shares on that day.

A. I find in the cash book on the debtor side page 204, under date of March 13th, an entry R. C. Crawford, 400 shares "Metropolitan, 96 and three quarters."

Mr. BROMAN: How many shares?

A. Four hundred shares.

Mr. BROWN:

Q. Does that refer to R. C. Crawford's New York account where the corresponding entry is found?

A. I will have to look.

A. (Witness examines book.) I find in R. C Crawford's New York account, at page 226 under date of March the 12th an entry on credit side of account 400 shares of Metropolitan Traction, 96 and ¾.

Q. Will you look at Toland Brothers' account in the ledger and see if there is 350 shares mentioned under that date?

A. I find the account of Toland Brothers and Company with the defendants on page 416 under date of March 13th, on the debit side of the account an entry of 350 shares of Metropolitan Traction 96 and ¾.

Q. What would that indicate upon its face, you say it is upon the debit side?

A. It would indicate that that amount of stock was sold by
166 Toland Brothers and Company on that day for the defendants.

Q. Crawford and Velentine.

A. Crawford and Valentine are these defendants, I suppose.

Q. Go on, what is the next item of Dick Brothers and Company?

A. I think the court will have to let me off pretty quick, I am so tired. I am exhausted physically.

The COURT: What the books show, can't you have some one else put on the stand, you are simply asking the witness what the books show. Suppose Mr. Pence take your place and Mr. Brown asks him what the books show.

The WITNESS: The books show for themselves.

Mr. MORAN: You have but a few more items.

The COURT: How many have you?

Mr. MORAN: Two or three.

The COURT: Why not have Mr. Brown read from the books what he wants in the record? Is there any objection to that Mr. Burke?

Mr. BURKE: No.

The COURT: That will relieve you.

The WITNESS: I don't want his comments. The last was March 13. On April the 16th 1895, as it appears on page 412 of the ledger, account of defendants with Dick Brothers and Company, there is an

entry on the debit side of the account of 100 Metropolitan Traction at 89 and ½.

Q. That means there was a sale doesn't it?

167 A. No sir—yes that we're charged with that, that was a sale, it is on the debit side of their account.

Q. It would indicate that there was a sale.

A. When I say it is on the debit side of Dick Brother- and Company's account, that would be a charge of course to them.

Q. What corresponding entries do you find there?

A. Do you mean in anybody's account?

Q. Yes?

A. I find on the cash book under date of April 16th on the credit side of the cash book an entry R. C. Crawford—hold on—I find on the debit side of the cash book, 225, an entry R. C. Crawford, 100 Metropolitan Traction at 89 and ½.

Q. Is there a ledger account in there corresponding with that, in R. C. Crawford's account?

A. I find in the account of R. C. Crawford, New York account, with the defendants, on the credit side of his account under date of April 16th 1895, the sale of 100 Metropolitan Traction at 89 and ½.

Q. Are there any other items in the Dick Brothers' account?

A. On April—under date of April 17th I find an entry on the debit side of Dick Brothers' account with the defendants "Dividend on 100 Metropolitan Traction, $125.00."

Q. When was the next one?

A. It shows as I understand it that the defendants received—the defendants charged Dick Brothers and Company with that amount of dividend on that day.

168 Q. Was there any further item?

A. No, sir.

Q. Now all those items in the Dick Brothers & Company account are intermingled with various items concerning other stocks are they not, you only picked out the Metropolitan Traction transactions?

A. There are other stocks in the account besides.

Q. Upon both sides of the account?

A. Yes.

Q. You have said that you could tell from the books that you could tell how it was that you knew it was your stock that was sold?

A. Yes sir.

Q. And you claim that these items which you have given from the books so show?

A. I claim that the items I have given from the books and the accounts as they appear here in full do show that.

The COURT: You haven't any knowledge of these matters except as disclosed from the books.

A. Well, I have knowledge from the sworn testimony of other witnesses.

Mr. BROWN: Which will be produced here?

A. Which will be produced here.

169 Q. Is there anything in Toland Brothers' account which you haven't shown which you desire to show as further tending to prove your statement?

A. I have said nothing—there are items——

Q. You spoke about Toland Brothers' account?

A. There are items in Toland Brothers' account that I have not mentioned yet.

Q. Will you do so?

A. Not to-night if the court will let me off.

Q. Let that go until to-morrow?

A. I think the Toland Brothers Company is short I will get through with it. It is only two or three items here. What do you want to ask me?

Q. I don't want to ask you anything, except I want to ask you to point out the items by which you know that that stock sold was yours?

A. Toland Brothers & Company's account with the defendant shows first on January the 26th—we have been over that.

Q. Yes, you have been over that, I think you have been over them all?

A. A sale—a receipt from Toland Brothers & Company of 50 shares Metropolitan and a sale of 50 shares Metropolitan on that day.

Q. You have been over them all unless it is that one?

A. No we have been over that.

Q. It is all shown in Toland Brothers' account. I wanted

170 you to have a full chance to tell how you knew?

A. It is very easily figured up just how the account stood from day to day.

Mr. BROWN: We will waive further cross examination of Mr. Burke until to-morrow morning.

Mr. PENCE: I offer these depositions which I am about to read together with all the exhibits attached thereto in evidence.

Counsel for plaintiff here read in evidence the deposition of Robert C. Drayton, and Evans R. Dick with the exhibits attached thereto.

Mr. BROWN: I think it ought to be stated that the deposition was taken on oral interrogatories.

Mr. PENCE: It appears so here in the deposition itself. Interrogated by Mr. Burke, it says. These depositions were taken in a former suit between the parties hereto wherein the causes of action set out in said former suit were substantially the same as in this suit. Said depositions with the exhibits attached thereto or identified therein, are as follows:

171 STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County.

JOHN E. BURKE, Plaintiff,
vs.
RICHARD C. CRAWFORD and EDWARD A. VALentine, Defendants. } Dec. Term, 1896.

Office of the commissioner, 400 Chestnut street, Philadelphia, Pennsylvania.

FEBRUARY 4TH, 1897, 10 o'clock a. m.

The depositions of Robert C. Drayton and Evans R. Dick, of the city and county of Philadelphia, State of Pennsylvania, of lawful age, produced, sworn, and examined upon their corporal oaths, on the fourth and fifth days of February, in the year of our Lord one thousand eight hundred and ninety-seven, at the office of said commissioner, 400 Chestnut street, in the city of Philadelphia and county aforesaid, by me, William M. Stewart, Jr., a commissioner duly appointed by *dedimus protestatem* or commission issued out of the clerk's office of the circuit court of Cook county, in the
172 State of Illinois, bearing test in the name of John A. Cooke, Esquire, clerk of the said circuit court of Cook county, with the seal of the said court affixed thereto, and to me directed as such commissioner, for the examination of said witnesses in a certain suit and matter in controversy now pending and undetermined in the said circuit court of Cook county, wherein John E. Burke is plaintiff and Richard C. Crawford and Edward A. Valentine defendants, in behalf of the said plaintiff, upon direct and cross-examination of counsel.

Present: The commissioner, William M. Stewart, Jr., Esq.; counsel for John E. Burke, plaintiff, John E. Burke, Esq.; counsel for Crawford and Valentine, defendants, E. O. Brown, Esq.

Index to Depositions.

Page.
Deposition of Robert C. Drayton, Feb'y 4th..... 3
Cross-examination,
" " Evans R. Dick, Feb'y 4th,
Resumed, Feb'y 5th..... 87
Cross-examination..... 88

173 *Deposition of Robert C. Drayton.*

The said ROBERT C. DRAYTON, being first duly sworn by me as a witness to the said cause, previous to the commencement of his examination, to testify the truth as well on the part of the plaintiff as of the defendant- in relation to the matters in controversy between the said plaintiff and defendant-, so far as he should be interrogated, testified and deposed as follows:

Examination by Mr. BURKE:

Q. State your name, age, occupation and place of residence.

A. Robert C. Drayton; thirty-eight years of age; banker and broker; 250 So. Seventeenth street, Philadelphia, Pennsylvania.

Q. State whether you are a member of the firm of Toland Brothers and Company; and if so, state how long you have been a member of said firm.

A. I am a member of the firm of Toland, Brothers and Company and have been a member of the firm since May 1st, 1893.

Q. State in what business said firm of Toland, Brothers and Company is engaged; and state also the place where and the length of time said firm has been so engaged in such business.

174 A. They are bankers and brokers and dealers in investment securities. Their place is 104 South Fifth street Philadelphia: Since May 1st, 1893, the present firm has been in existence. The firm before the present one had been in existence since January, 1893.

Q. State whether you know Richard C. Crawford and Edward A. Valentine, defendants in this suit, or either of them; and, if so, how long you have known them, or either of them, personally.

A. I do not know either of them personally. I think one of them was in the office here, on an errand, but I do not know which one it was, and I only met him casually.

Q. State whether the said firm of Toland, Brothers and Company ever had any business transactions with the firm of Crawford and Valentine, a firm composed of the said Richard C. Crawford and Edward A. Valentine.

A. We have had.

Q. State whether said firm of Toland, Brothers and Company ever had any transactions with the said firm of Crawford and Valentine with reference to shares of the capital stock of the Metropolitan Traction Company.

A. We have had.

Q. Have you copies of certain accounts rendered by Toland, Brothers and Company to Crawford and Valentine; and, if

175 so, please produce them to the commissioners, first arranging them in the order in which they were rendered.

A. I have such copies here, and I now hand them to the commissioner.

(The witness produces three papers, which are marked by the commissioner "Exhibits A, B, and C,") and hereto annexed.

Q. At about what time were these accounts rendered and sent to Crawford and Valentine?

A. This one ("Exhibit A") was mailed on the last day of February, 1895. This one ("Exhibit B") was sent on March 14th, 1895. As to the one marked "Exhibit C," I cannot say on what day it was sent but I suppose it was the 29th of March, 1895, as that was the day on which we received their check to balance up the account.

Q. But it was sent?

A. Yes.

(The accounts marked "Exhibits A, B and C" respectively are offered in evidence.)

Q. Have you here also a paper containing one general statement showing the entire account with Crawford and Valentine?

A. I have.

(The witness produces a statement, which is marked for purposes of identification "Exhibit D.") and is hereto annexed. (The
176 paper, "Exhibit D," being a consolidation of the other accounts, is offered in evidence.)

Q. What was the first transaction that your firm had with Crawford and Valentine in Metropolitan Traction stock?

A. The first transaction we had was that we paid Dick Brothers and Co., of this city, for fifty shares of stock; sold the stock for them and remitted them a check for the balance.

Q. That is, Dick Brothers and Co., of this city, turned over fifty shares of Metropolitan Traction stock to your firm for the account of Crawford and Valentine?

A. Yes.

Q. And on the same day that it was turned over you sold the stock and remitted to Crawford and Valentine the difference between what you paid Dick Brothers and Co. and what you sold the stock for?

A. Yes.

Q. That transaction, as I understand you, did not go into the general account that you had with Crawford and Valentine?

A. No.

Q. It was put where?

A. In the account that we called "sundry stocks."

177 Q. On what date do you say that was?

A. January 28th, 1895.

Q. What was the next transaction that your firm had with Crawford and Valentine in Metropolitan Traction stock?

A. The next was on January 29th, 1895. We paid Huhn and Glendinning $24,000 for the delivery of three hundred shares of Metropolitan Traction Company stock.

Q. How did it happen that that stock was transferred to your firm by Huhn and Glendinning? Explain that transaction.

A. We were asked by Crawford and Valentine if we would pay Huhn and Glendinning that amount of money on that amount of stock. We agreed to do it and paid them for it on their order.

Q. The stock was turned over?

A. The stock was turned over to us.

Q. And you held that stock as collateral security for the amount advanced?

Mr. BROWN: I object.

(Ques. withdrawn)

Q. What was the next transaction you had with them?

A. The next was this. On the 30th of January, 1895, we bought fifty shares of Metropolitan Traction at 92⅛

178 Q. Amounting to now much.

A. $4,609.38. Before I go any further I want to explain to you that that is the date on which we paid for it. Our custom is to buy it on the day before and pay for it on the next day. We may have bought it two days before.

Q. In other words, when you buy stock, it is not deliverable until the next day?

A. It is not deliverable until the next day.

Q. And you did not credit your customers with purchase or sales until the next day?

A. Not until the day we pay for it or receive the money.

Q. Is it not true that sometimes stock bought or sold is not delivered for two days afterward? For instance when stock is bought or sold on Friday or Saturday, on your stock exchange here, when is that stock transferable?

A. It is deliverable on the following Monday.

Q. Then it would not be entered up against your customers or in their favor until Monday?

A. No.

Q. So that that fifty shares of stock which is under date of January 30th, 1895, was purchased the day before?

A. Probably. I can verify that by my purchase and sales book, if you want it.

179 Q. But the fact is that that is the custom?

A. That is the custom, yes.

Q. State the next transaction in Metropolitan Traction stock had between your firm and Crawford and Valentine.

A. February 1st, 1895—100 shares purchased at 96¼, amounting to $9,631.25.

Q. That was purchased in the last of January and charged on the 1st of February?

A. Yes.

Q. What was the next transaction in Metropolitan between your firm and Crawford and Valentine?

A. February 4th, 1895—100 shares sold at 100¼, amounting to $10,018.75.

Q. What was the next transaction relating to Metropolitan stock?

A. "Relating" to it? On that same date we paid a draft drawn on us, by Crawford and Valentine, for $2500.

Q. What was the next item?

A. On the 28th of February, 1895, we charged them up with interest $107.10.

Q. On March 1st how many shares of the capital stock of the Metropolitan Traction Company did you have on hand for the account of Crawford and Valentine?

180 A. 350 shares.

Q. State the next transaction relating to Metropolitan.

A. March 14th, 1895—sold 350 shares of Metropolitan Traction at 96¾, amounting to $33,840.63. On the same date—March 14th, 1895—we charged them up with interest amounting to $44.53; leaving a balance of $2967.12 due them.

Q. What was the next transaction relating to Metropolitan Traction stock between the two firms?

A. On March 18th, 1895, we paid a draft drawn by Crawford and Valentine, on us, for $3,000.

Q. What was the next occurrence?

A. On March 29th, 1895, we received a check from Crawford and Valentine for $32.88 to close the account.

Q. What was that check of $32.88 for?

A. To balance the account.

Q. There had been an over-draft by Crawford and Valentine on you?

A. There had been on us.

Q. Of that amount?

A. Yes.

Q. On whose order were these purchases and sales of the Metropolitan Traction Company stock made?

181 A. On the order of Messrs. Crawford and Valentine.

Q. Did Crawford and Valentine ever make any objection to the accounts that you rendered them?

A. No.

Q. What is called the Metropolitan Traction Company—what is that?

A. The Metropolitan Traction Company is a company formed by a number of individuals for the purpose of acquiring a majority or a controlling interest, we will say, of the stock of various surface railroads in New York city.

Q. Street railways?

A. Street railways.

Q. Did your firm receive from Crawford and Valentine a letter dated January 29th, 1895, with reference to shares of Metropolitan Traction stock?

A. Yes.

Q. Please produce the letter.

(Witness produces letter.)

Counsel for defendants agrees that a copy of the original letter

may be offered in evidence and have the same effect as the original would have if presented.

(Copy of letter is marked for identification "Exhibit E.") and is hereto annexed.

182 Q. Did your firm receive from Crawford and Valentine a letter dated March 27th, 1895, with reference to the account?

A. Yes.

Q. Have you the letter now here?

A. I have. I produce it. (Letter produced.)

Counsel for defendants agrees that a copy of the original letter may be offered in evidence and have the same effect as the original would have if presented.

(Copy of letter referred to is marked for identification "Exhibit F.") and is hereto annexed.

Q. On January 29th, 1895, did your firm send to Crawford and Valentine a letter with reference to certain shares of Metropolitan Traction stock?

A. Yes.

Q. Have you a copy of that letter?

A. I have.

Q. Will you present it to the commissioner?

A. I now present the copy.

Counsel for defendants agrees that a copy of the original letter may be offered in evidence and have the same effect as the original would have if presented.

183 (Copy of letter referred to, marked "Exhibit G," is offered in evidence, and is hereto annexed.

Q. State whether on February 4th, 1895, your firm wrote to Crawford and Valentine with reference to any transaction had between your firms relating to Metropolitan Traction stock.

A. Yes, on February 4th, 1895.

Q. Have you a copy of that letter?

A. I have.

Q. Will you present the copy?

A. I will. (Copy produced.)

Counsel for defendants agrees that a copy of the original letter may be offered in evidence and have the same effect as the original would have if presented.

(Copy of letter referred to, marked "Exhibit H," is offered in evidence.) and hereto annexed.

Q. Did your firm send a letter to Crawford and Valentine, dated March 18th, 1895?

A. Yes.

Q. Have you a copy of that letter?

A. Yes.

Q. Will you produce it?

A. I will. (Copy produced.)

184 Counsel for defendants agrees that a copy of the original letter may be offered in evidence and have the same effect as the original would have if presented.

(Copy of letter referred to, marked "Exhibit I," is offered in evidence.) and is hereto annexed.

Q. Did your firm write to Crawford and Valentine on March 29th?

A. Yes.

Q. Have you a copy of that letter?

A. Yes. I now produce it.

Q. Is this a copy of the letter sent by your firm to Crawford and Valentine?

A. It is. (Copy produced.)

Counsel for defendants agrees that a copy of the original letter may be offered in evidence and have the same effect as the original would have if presented.

(Copy of letter referred to, marked "Exhibit J," is offered in evidence.) and is hereto annexed.

Q. Did the firm of Toland, Brothers and Co. send a letter to Crawford and Valentine, dated March 13th, 1895?

A. Yes.

Q. Have you a copy of that letter?

A. I have. (Copy produced.)

185 Q. Is that the copy?

A. That is the copy.

Counsel for defendants agrees that a copy of the original letter may be offered in evidence and have the same effect as the original would have if presented.

(Copy of letter referred to, marked "Exhibit K," is offered in evidence.) and is hereto annexed.

Q. In 1895 on what stock exchanges was the stock of the Metropolitan Traction Company dealt in?

A. I can say it was dealt in, in the Philadelphia stock exchange. It may have been dealt in in every stock exchange in the country for all I know. I only know of our own market. There were some transactions in it in New York but very few. Philadelphia was the principal market, practically it was the only market. As an illustration of what I mean by that I may say that some times American Sugar Refinery stock is dealt in in this market but New York is practically the m-rket for it.

186 Q. What was the current market price of shares of Metropolitan Traction stock, at Philadelphia, on January 29, 1895?

A. It ranged from 90½ to 92⅛—the lowest and the highest prices.

Q. What did it close at on that day?

A. The last sale was at 92⅛.

Q. It closed at that, on that day?

A. That was the last sale.

Q. What was the current market price of shares of Metropolitan Traction stock, on May 20, 1895?

(Objected to as immaterial and irrelevant.)

A. There was only one lot sold that day—20 shares at 96—and in brokers' parlance, we would hardly call that a quotation.

Q. What was the price of the stock on the next day, May 21?

A. From 94½ to 95⅝.

(Question and answer objected to as immaterial.)

Q. When was the account between Toland Brothers and Crawford & Valentine closed?

A. March 29, 1895.

Q. You have had no transactions with them since.

A. No.

187 Q. State whether on or after March 15, 1895, the firm of Toland Bros. & Co. held or carried for the account of the firm of Crawford & Valentine, any shares of the capital stock of the Metropolitan Traction Company?

A. We carried none after that date.

Q. State whether Crawford & Valentine ever deposited with, or advanced to, Toland Bros. & Co., any money as margin for security, on account of transactions in shares of the stock of the Metropolitan Traction Company.

A. I do not understand that question exactly.

Q. Whether they ever deposited any money.

A. No; they never gave us any money.

Q. Did Toland Bros. & Co. ever call upon Crawford & Valentine to deposit any money?

A. No.

Q. What is the present current value of Metropolitan Traction stock?

(Objected to as immaterial and irrelevant.)

A. I can go out and look at the ticker. That is the only way I can find out.

Q. I want the information.

A. (After leaving the room and returning.) 108.

Q. That is the present current quotation, to-day.

A. Yes; 108 bid for it.

188 Q. What is the highest market price of Metropolitan Traction stock, in 1896?

(Objected to by counsel for defendant, as immaterial and irrelevant; he also objects to any answer being given which is not derived from the personal knowledge of the witness.)

A. The highest in 1896, was 112¾. (After referring to book.)

By Mr. BROWN:

Q. Will you state how you know that?
A. I know it from the official report of the stock exchange.
Q. What stock exchange?
A. Philadelphia stock exchange.
Q. A printed copy of which you have before you.
A. Yes. I have not verified it by the books of the stock exchange, at all.

By Mr. BURKE:

Q. How high was Metropolitan Traction stock, in September, 1895?
A. It was 115 on November 19, 1895. That is the highest.

By Mr. BROWN:

Q. How do you know that?
189 A. From the official report. I get my information from the official list of sales at the Philadelphia stock exchange, published by McLaughlin Bros.
Q. Just state again what you said about McLaughlin Bros.
A. They are the official publishers of the transactions of the stock exchange.

Cross-examined.

By Mr. BROWN:

Q. I think you said that you, yourself, were not personally acquainted with Mr. Crawford or Mr. Valentine.
A. I did. As I said, I think I met one of them here; but to say I am personally acquainted with them, I am not.
Q. You think you may have met one of them, but you do not remember it—casually.
A. Yes.
Q. Do you know who introduced you to the one you did meet?
A. No. I think one of my partners did.
Q. Do you know whether any one of your partners is better acquainted with Mr. Crawford or Mr. Valentine, than yourself?
A. Whether one of them is personally acquainted? Yes; I know one of them is.
190 Q. Which one?
A. Mr. Edward Toland.
Q. How long has he known them?
A. I do not know.
Q. Did this firm of Toland Bros. & Co. ever have other business with Crawford & Valentine, than the particular business concerning which you have testified?
A. We have had.
Q. What was its nature?
A. General bonds and stocks.

Q. Have they dealt through you as brokers, in bonds and stocks which are commonly bought and sold in this market?

A. Yes. I cannot say it was absolutely bonds, but I know we had some stock transactions with them. What it was, I could not say.

Q. Crawford & Valentine were, to your knowledge, stock brokers in Chicago, were they not? You knew they were.

A. Yes. We were introduced to them by our New York correspondent, who knew them.

Q. Who was your New York correspondent?

A. E. & C. Randolph of New York. They introduced them to us.

Q. You knew them to be members of the New York stock exchange.

191 A. No; I cannot say that I did know they were members of the New York stock exchange. Do you mean E. & C. Randolph?

Q. No; Crawford & Valentine.

A. No; I did not know they were members of the New York stock exchange.

Q. Were they members of the Philadelphia stock exchange?

A. I do not think they were.

Q. How long had you known them to be stock brokers in Chicago?

A. I do now know.

Q. Can you tell from your books, the first transactions that you had with them in your business?

A. I can by looking over our books.

Q. I wish you would have that done for me. Just give me the date of the first transaction.

A. (The witness leaves the room and returns.) I think that our first transaction with them, that I can find record of, was in September, 1894.

Q. Had they dealt with you frequently?

A. We had considerable transactions with them.

Q. What stocks had they dealt in?

A. At that time, I think they were doing something for us, in Chicago; bought some things for us in Chicago.

Q. So you had a running account with them

192 A. At that time.

Q. Had you any acquaintance with, or business with, the firm of Valentine & McAvoy?

A. I think not. I do not remember anything.

Q. Did you know there was such a firm preceding the firm of Crawford & Valentine?

A. Personally, I did not.

Q. Did you personally attend to this business concerning which you have been interrogated this morning?

A. I have charge of the books of the concern. You see the members of the firm attend to different things. Some attend to one department, and some to another. I attend to the books. When the

transactions would ultimately come to the books, they would come under my control.

Q. Have you given copies of all the correspondence which passed between you, in relation to this Metropolitan Traction stock concerning which you have been interrogated, or was there other correspondence by wire or letter?

A. I imagine there was other correspondence. I suppose there was, from the transactions, because I do not think these covered all the dealings.

Q. Have you looked for that?

A. No; I have not looked for it.

Q. I should like to have you do so. Can you have it looked up?

193 A. Yes; I can have it looked up.

Q. You stated in answer to Mr. Burke's question, that Crawford & Valentine did not deposit any money with you as margin upon this stock. I will ask you what the course of business was in the various transactions which Crawford & Valentine in Chicago had with you here, in relation to the purchase and sale of stock, so far as margins were concerned. Were they obliged, when you were carrying stocks for their account, to keep that margin in some way?

A. Do you mean with reference to this Metropolitan Traction stock?

Q. I am asking about the general course of business.

A. I think I was only subpœnaed to testify about this Metropolitan Traction, and I cannot go into any other transactions.

Q. I have a right, on cross-examination, to inquire about this matter.

A. I prefer not to go on without consulting my counsel, as to what I can testify to and what I cannot testify to.

Q. You stated, in answer to Mr. Burke's question, that Crawford & Valentine did not deposit any money with you as margin upon this stock. I will ask you what the course of business was in the various transactions which Crawford & Valentine in Chicago

194 had with you here, in relation to the purchase and sale of stock, so far as margins were concerned. Were they obliged, when you were carrying stocks for their account, to keep that margin in some way?

A. Yes.

Q. To what amount or proportion of the value of the stock?

By Mr. BURKE:

Q. If there was any custom.

A. We would ask them, on Metropolitan Traction stock, to deposit about $10 a share

By Mr. BROWN:

Q. Then, how was it that in the case of these transactions which you have testified to, they did not deposit margins with you?

A. Because we took up the $300 shares from Huhn & Glendenning, at about $10 below the market price.

Q. That is, as your account shows here, when you took the shares from Huhn & Glendenning, you paid to Huhn & Glendenning what would be equivalent to $80 a share.

A. Yes.

Q. Whereas the market price, as you stated, then was something like 92.

A. Something like that.

Q. That left them a margin of value.

195 A. Yes.

Q. And Crawford & Valentine had continuously, from that time until the account was closed, with the exception of the time during which there was an overdraft of thirty-two odd dollars, a balance with you, had they not?

A. Yes.

Q. To their credit.

A. Yes.

Q. After the first of these transactions in Metropolitan Traction stock, from January 29, 1895, up to May 20, 1895, did you have any other transactions with Crawford & Valentine, than these relating to this Metropolitan Traction stock?

A. No.

Q. All which you have spoken of, took place prior to this account?

A. Prior to that.

Q. At this time were you either carrying for them any stocks, or had you any stocks sold for their account, other than this?

A. No.

Q. I will ask you whether, in the course of business between Crawford & Valentine and yourselves, you ever sold stocks for them short?

A. I do not think we ever did.

196 Q. It is a custom of the broker business, is it not, to sell stocks short?

A. Yes.

Q. That is, to sell them for future delivery.

A. Future delivery.

Q. To sell them whether or not you are in possession of them at the time.

A. Yes.

Q. What was the commission charged on purchase and sales of stock to Crawford & Valentine, by you?

A. 1/16 of one per cent.

Q. Both for purchases and for sales.

A. Yes.

Q. It does not appear in these accounts, that you have furnished them any charge for commission. In what is the commission included?

A. It is included in the prices there. It is included in the prices for which we charged or carried them.

Q. That is, in the account with them you charged them the amounts which you paid for stock, and also 1/16 of one per cent. on the par value of the stock.

A. Yes.

Q. And the aggregate of that amount is what you charged them.

197 A. Charged them with.

Q. And when you sell for their account, you deduct 1/16 of one per cent. of the par value of the stock, from the amount which you receive?

A. Yes.

Q. And you credit them with the difference.

A. Yes. There is some special exceptions made in our stock exchange, on some stocks—not on these stocks.

Q. You mean exceptions as to the amount.

A. I mean exceptions as to the amount.

Q. Have you a copy of the rules of your stock exchange?

A. We have.

Q. Is it in pamphlet form?

A. Pamphlet form.

Q. Will you get me one?

A. They are only for the use of the members. If you went to the secretary of the stock exchange, he might furnish you with one.

Q. You say this was the market for Metropolitan Traction. Was it listed here?

A. It is on what is called our unlisted securities. We have two classes of securities in the Philadelphia stock exchange and also in the New York stock exchange—listed securities and unlisted

198 securities. Unlisted securities are stocks that have not complied with certain laws of the stock exchange, which is necessary to put them on the regular list, where they are called "regular."

Q. Where are the offices of the Metropolitan Traction?

A. In New York.

Q. Do you know why it is that it is dealt in here rather than in New York?

A. New York has never looked favorably upon traction securities.

Q. You mean the New York stock exchange.

A. The New York stock exchange, I mean.

Q. Did you ever know of any certificate of shares of this stock being actually dealt in, in Chicago?

A. I do not know.

Q. Did you send for the $32 which Crawford & Valentine sent you under date of March 27, or did they discover the mistake, themselves?

A. No; we sent for it. It appears in copies of our letters which I have produced in direct examination.

Q. Did you have any knowledge, in the course of any of the transactions between yourselves and Crawford & Valentine, of any principals or other persons for whom Crawford & Valentine were acting?

A. No.

199 Q. Their transactions were all in their own name.

A. In their own name; yes.

Q. Is that the custom of the business, when you do business with brokers abroad?

A. That is the custom of the business.

Q. Do you deal largely, and do brokers in Philadelphia deal largely, in relation to the securities for which Philadelphia is the market, with brokers in other cities?

A. Yes.

Q. And do they ever disclose the principals for whom they may be acting?

A. No; never.

Q. Is the commission which you charged Crawford & Valentine, 1/16 of one per cent., the ordinary and customary commission charged to persons other than brokers for whom you buy and sell stocks?

A. It is not the ordinary commission.

Q. What is?

A. It is just double.

Q. In Metropolitan Traction——

A. It would be $12.50 a share. That is the minimum charge that we can make. We can charge as much more as a man will pay, but we would lose business if we did. We are allowed to divide with brokers in other cities.

200 Q. Is that one of the rules of your stock exchange?

A. That is one of the rules of our stock exchange.

Q. Then, the custom of the business is you charge brokers in other cities, one-half of what you charge your customers who are not brokers.

A. Exactly.

Q. I would like to have you give me a statement of the course of business upon the purchase and sale of stocks in this market, concerning the delivery of the same to the purchasing brokers by the selling brokers. First, I will ask you whether, in dealing as brokers in Philadelphia, you deal entirely upon the stock exchange and with other brokers, in selling.

A. Yes; we deal with other brokers.

Q. In purchasing or selling stocks, you deal with other brokers, in the Philadelphia stock exchange.

A. With other brokers. In the stock exchange, any other persons are not allowed on the floor, except employés.

Q. And in such dealings, do you disclose the names of the persons for whom you are acting?

A. No.

Q. So that in selling this stock, or buying this stock, concerning which you had transactions with Crawford & Valentine you

201 bought from and sold to other brokers in Philadelphia and did not disclose the fact that Crawford & Valentine had anything to do with the matter. Is that so?

(Objected to as not competent cross-examination. The whole line of this cross-examination is objected to as being improper and having no foundation laid for it.)

A. That is so. The only exception is when we paid Huhn & Glengenning and took on their orders. That was not a purchase at all.

Q. I understand, of course, when you took over the stock from Huhn & Glendenning, that——

A. Both Huhn & Glendenning and ourselves knew what it was.

(Same objections as above.)

Q. Then, of course, it was known that the transaction was for Crawford & Valentine.

A. Yes.

Q. Though when you bought and sold stock, you did not disclose the names of the persons?

(Same objections as above.)

A. No.

Q. You have spoken, also, of the term "regular." What does that mean—buying and selling "regular"?

A. That means buying and selling regular, it is deliverable the next day at the stock exchange.

(Same objections as above.)

202 Q. What custom of selling is there in Philadelphia, other than regular?

(Same objections as above.)

A. There is two days, three days, five days, ten days, sixty days and thirty days.

Q. That is, a special contract between the brokers may be made for delivery in the future.

(Same objections as above.)

A. Yes.

Q. Is the time then fixed, or is it an option?

(Same objections as above.)

A. No; the seller has the option of delivering at any time within the period fixed, anything over three carrying interest at six per cent.

Q. Then, there are sales made upon the seller's option?

(Same objections as above.)

A. Yes, sir; and purchases made upon buyer's option.

Q. In such cases, is there a clearing house transaction at any time, of the trades, as it is called, "rung up"? Are the trades settled?

(Same objections as above.)

A. We have a clearing house; yes.

Q. And in the case of sales made for future delivery at seller's option or buyer's option, are those trades sometimes settled
203 without any delivery at all, by purchases and sales of the same stock being off-set against each other, or by any clearing house arrangement?

(Objected to as irrelevant and immaterial and not proper cross-examination, and the same objection made to all questions on this line.)

A. If we had sold a hundred shares of stock to a broker and we bought it back from him, for purposes of convenience, probably no stock would pass. If we did not buy it back from that same broker, we would have to deliver the stock.

Q. If you did not buy it back from that same broker, have you any clearing house arrangement by which the trades might be settled?

(Same objections as above.)

A. Yes; we have the clearing house. You might borrow from another broker and then the clearing house sheet might balance, and therefore we would have no absolute stock passing.

Q. Are there clearing house transactions, also, with reference to stocks that are bought and sold regular?

(Same objections as above.)

A. Yes, sir. The sellers' option question would not enter into the clearing house, at all. We have a clearing house every day.

Q. So that whether stocks are bought or sold for future
204 delivery or bought or sold regular, your clearing house statement would be the same.

(Same objections as above.)

A. Exactly the same.

Q. And it might be that buying from some other broker for one correspondent, there would be the same amount of stock which you sold to that same broker for another correspondent, and there would be no actual stock pass between you.

(Same objections as above.)

A. Exactly.

Q. Because your sheets would balance.

(Same objections as above.)

A. Yes.

Q. And that would also be so if the sum of your transactions upon the Philadelphia stock exchange, in any one kind of stock, equaled in purchases what they equaled in sales.

(Same objections as above.)

A. Yes; in the same stock. It might not go into the clearing house at all. We might make the absolute delivery.

Q. Or it might go into the clearing house.

(Same objections as above.)

A. Or it might go into the clearing house.

Q. The same all over the world.

(Same objections as above.)

205 A. The same all over the world.

Q. Do you know whether in this particular stock here, you had upon hand the actual certificates of stock in each case or not?

A. We had the absolute certificates of stock on hand, in each case.

Q. And you delivered them when you sold.

A. When we sold.

Q. What is the interest which is charged, upon?

A. The interest is upon the amount of money that we paid for the stocks—what we call the balances—the difference between the debit and the credit side of the account.

Q. Were you dealing in Metropolitan Traction stock at this time, for anybody else?

A. I do not know. I guess so. I think we were. I could not say.

Q. How do you know, then, that you had the actual stock on hand here, other than this 300 shares that you took from Huhn & Glendenning? Do you remember, of your own knowledge, or how do you know that as to the 100 shares of Metropolitan Traction bought upon February 1, you yourselves, were not long upon that day, that amount of stock in the stock exchange here?

A. I suppose I could find out.

206 Q. Suppose your books show that you had, upon that day, bought and sold the same amount of Metropolitan Traction, would you then have had actually passed to you the certificate of stock for this 100 shares. I do not mean what the theoretical result would have been, but would you have had the certificate?

(Objected to *and* immaterial and irrelevant.)

A. If we bought and sold, the same day, the same stock, we probably would not have the certificate.

Q. Do you know of your own knowledge?

A. No; I have not looked that up. I do know that on that day, if Crawford & Valentine had tendered us the money for that stock, they would have had the certificates of Metropolitan Traction delivered to them. There was no mark on any stock that we received, that it belonged to Crawford & Valentine—until they paid for it.

Q. I understand that. I understand that you held yourselves ready to deliver, upon the payment of the money which you had charged to Crawford & Valentine, the amount of stock, at any minute.

A. Yes.

Q. There is no question about that. What I want to know, you have already stated in your answer to my last question.
207 There was no particular stock which was marked to Crawford & Valentine.

A. No.

Q. How are these certificates of stock, when you receive them at all, made out? Are they endorsed in blank?

(Same objections as above.)

A. Endorsed in blank.

Q. They may have been issued to anybody.

(Same objections as above.)

A. Yes.

Q. A, B, C, D, E, F?

(Objected to as above.)

—. Anybody.

Q. And are by him endorsed in blank.

(Same objections as above.)

A. In blank.

Q. There is no transfer of stock upon the books of the company.

(Same objections as above.)

A. Not necessarily—in hundred share lots. Fractional lots would have to be delivered by transferring it.

Q. But when the certificate, itself, is delivered, do you send it to the office of the company to have it transferred upon the books of the company?

(Same objections as above.)

208 A. Not necessarily.

Q. Well, usually.

(Same objection as above.)

A. No, sir; not until we are ready.

Q. When you want it.

(Same objections as above.)

A. When we want it, we send it to the office.

Q. For instance, with reference to these 300 shares that you took over from Huhn & Glendenning; did you get an actual certificate of stock from them, for 300 shares?

A. I think we did. I will look and see.

Q. I wish you would.

A. That day was what?

Q. The 29th of January.

A. (After leaving the room and returning.) January 29, we received 200 shares from them. 100 shares was off-set by 100 that we

owed them on another transaction; so we received 200 shares of stock. You see, that is a convenience, simply to off-set the stock. They would simply have delivered it to us, and we would have delivered it back to them.

Q. What I was going to ask about those 200 shares, was: Were they transferred upon the books of the company, to you?

A. No, sir; they were delivered endorsed in blank.

Q. You do not know by whom they were endorsed.

209 A. Some name, and guaranteed by Huhn & Glendenning. They guaranteed the endorsement—either Huhn & Glendenning or some other member of the stock exchange. I couldn't swear who guaranteed the endorsement.

Q. Some member of the stock exchange guarantees the endorsement.

A. Some member of the stock exchange guarantees the endorsement.

Q. That means it is not forgery.

A. That means it is not forgery; exactly.

Q. You have said that up to the time that Crawford & Valentine overdrew upon you $32, they had a balance with you. Suppose that by the fluctuations of the market the Metropolitan Traction stock had gone down to a point at which, if it had been sold at its market value and the credit of that amount been placed upon the credit side of Crawford & Valentine's account, the account would have shown either a debit balance against them, or been even, or a credit balance not equal, by any considerable amount, to ten per cent. of the value of the stock, what would have been the ordinary course of business for you, so far as margins are concerned?

(Same objections as above.)

A. If the stock had been closed out, there would not have been any margin there.

210 Q. I say if the stock had gone to a point at which, had you sold it, the amount would not have been sufficient to cover their debit balance, then what would you have done—not if you sold it, but if the stock had gone to a point where, if sold, it wouldn't have brought sufficient to cover their debit balance, then what would you have done?

A. Supposing them to be reputable people, we would have drawn upon them.

Q. For what?

A. For a sufficient amount to margin the stock down.

Q. A sufficient amount to give you ten per cent. over the market value of the stock?

A. Yes.

Q. That is what I supposed. And that is the custom of your business, with brokers.

A. Yes.

Q. Do you know the reason why the minimum commission you

are allowed to charge brokers, is less than the minimum you are allowed to charge other people?

A. What is the reason?

Q. Has it anything to do with the ease of getting margins?

A. I think it is a reciprocal arrangement, to a certain extent. New York will not divide. Other places will divide. Philadelphia is one. Boston will divide.

211 Q. Is it easier to call brokers than it is other people?

A. Yes.

Q. You can always reach them for margins.

A. Yes; always reach them. But I do not think that is the reason for less commission. We would deal with a broker for less margin than we would for an individual, on account of the ease of reaching him.

Q. What is the amount of margin for Metropolitan Traction, for individuals?

A. It depends upon the individual.

Q. An ordinary individual dealing, to whom you have just been introduced, in whom you do not have some special confidence,—what would be the ordinary margin required by brokers here, for Metropolitan Traction?

A. Some brokers require more, and some less. Metropolitan Traction is in a different position than it was at that time.

Q. At that time,——

A. At that time, I do not think I would have dealt with an individual under fifteen or twenty dollars a share; that is, as you stated the individual to me.

212 Q. I would like to ask you about this matter of borrowing or loaning stocks here. When you are carrying stocks for brokers outside of Philadelphia, in other cities, upon margins, have you the control of the stock, according to the rules of the Philadelphia stock exchange?

A. Yes.

Q. Do you deal with it as your own subject to your obligation to deliver it?

A. As far as our equity in it is concerned.

Q. Is such stock loaned and borrowed here according to the custom of the stock exchange?

A. We are very apt to take it to bank and borrow money on it.

Q. Is it loaned, I mean, for deliveries to other brokers?

A. Sometimes; yes.

Q. Is there a regular custom of that sort?

A. A custom of that sort; yes.

Q. What is that custom?

A. How do you mean, what is it?

Q. What is the general usage in loaning and borrowing stock in the Philadelphia stock exchange?

A. If we had been carrying a stock for any person, we would lend some of that stock, if any other broker wanted to borrow it. We would lend as much of that stock as we had an equity in.

213 Q. By equity you mean your money in it.

A. To the amount that our money was locked up in the stock.

Q. Is there a pit or crowd in the stock exchange, in which such loans are made?

A. No; I do not think it requires it.

Q. There is such a thing in New York.

A. I think there is a loaning and borrowing crowd there.

Q. Did you ever know Mr. Burke before May 20, 1895?

A. No.

Q. You never saw him before that time.

A. I do not remember seeing him before.

Q. You never heard of him in connection with stock transactions, that you remember.

A. Not that I remember.

Q. Are these exhibits, A, B, C, and D, which you produced in the direct examination, transcripts from your ledger, each of them, or is this Exhibit D, of which you speak as being a summary of the others, not a transcript? Does that actually appear in the ledger in that form?

A. No; it does not so appear in our ledger.

Q. A, B, and C, then, are transcripts from your ledger.

A. Yes.

214 Q. And D is a summary, now made, which shows the entire business concerning Metropolitan Traction stock, from your ledger account.

A. Yes.

Q. When it appears upon your books that you are carrying any particular stock for a customer at any particular time, it is the language of the trade, is it not, to say that you are long of that amount of stock for him?

A. Yes.

Q. Then, using that expression, this account shows, does it not, that you were long for Crawford & Valentine, 300 shares of Metropolitan Traction, upon the 29th of January, 1895; 350 shares upon January 30, 1895; 450 shares upon February 1, 1895; and up to February 4, 1895.

A. Yes.

Q. That upon February 4, you sold for their account, 100 shares; and that from February 4 until the 14th of March, 1895, you were long for them, 350 shares; that upon March 14, you sold for their account, 350 shares; and after that time, were neither long nor short.

A. Yes.

Re-examined.

By Mr. BURKE:

—. Of the 300 shares of the Metropolitan Traction stock re-
215 ceived by your firm from Huhn & Glendenning on January 29, 1895, you say that certificates were delivered for 200 shares.

A. Yes.

Q. And for the other 100 shares, there was an off-set.

A. Yes.

Q. What was that off-set? You had 100 shares sold to them, at that time.

A. Yes, sir; we owed them 100 shares of stock.

Q. You had sold to them 100 shares.

A. It may be we had to deliver it to them for another party. I do not remember the transaction.

Q. Explain the off-set.

A. We owed them 100 shares of the stock on entirely different transactions, and they owed us 300 shares on this transaction, and instead of giving us the 300 shares of stock and we delivering them another 100 shares of stock, we simply made an off-set of 100 shares.

Q. Instead of your delivering to them the 100 shares and then they delivering it back to you, you considered that an off-set of the 100 shares.

A. Yes.

Q. If you had that 100 shares sold to them, which 100 shares was an off-set of 100 from the 300 that was coming to you, then
216 you had that stock that you sold to them, and retained that 100 shares in the place of the 100 that they might deliver to you.

A. Exactly.

Q. So that you did have the 300 shares.

A. Yes; the 300 shares. I should say so.

Q. Now, when you sold the 350 shares in March, you delivered that stock on that sale.

A. Yes; 350 shares. I cannot say it was those self-same certificates; but we delivered 350 shares of Metropolitan Traction, on that date.

Q. On that sale.

A. Yes.

Q. You do not always deliver on the next business day, do you? For instance, suppose you sell on Friday, or buy on Friday, that stock is not deliverable until the following Monday.

A. Unless it is sold cash.

Q. So that stock sold on Friday, or bought on Friday, as a rule, would be deliverable on Monday.

A. Yes.

Q. Although there is business done on the following day, Saturday.

A. Yes.

Q. Stock sold on Saturday, would not be deliverable until
217 the following Monday, would it?

A. No.

Q. Is not the question of margins one regulated entirely by—does not it depend entirely upon—the character of the people with whom you are dealing, in regard to the amount which you may require?

A. Yes.

Q. You might have a customer for whom you would make purchases or sales of Metropolitan Traction stocks, for less than ten per cent. margin. Is not that true?

A. We might.

Q. I will ask you whether there is, to your knowledge, any uniform custom or rule, here in Philadelphia, among stock-brokers, as to the amount of margins, or per cent. of margins, required?

A. A uniform rule?

Q. Yes.

A. No; there is no uniform rule. It depends entirely upon the broker, who exacts his own margin. The broker uses his own judgment in that matter.

Q. I suppose there are men here in Philadelphia whom you know so well, as to their character and responsibility, that you would take an order for the purchase or sale of Metropolitan Traction stock, without asking for any money, is there not?

218 A. No.

Q. Is there no such man in Philadelphia?

A. No. I do not think any man in Philadelphia would deal with a broker without some margin, because he would have to do it for other people, and get sewed up himself. I would like to qualify that answer that there is nobody. For a large amount, I would not. I might buy a hundred shares of stock that did not cost more than eight or ten dollars a share, without margin.

Re-cross-examined.

By Mr. BROWN:

Q. You mean, when you say you would not deal without money, that you would not deal without margin.

A. Exactly.

Q. And you do not mean, by the last qualification in your answer, to say that you would deal for anybody in Metropolitan Traction, to the extent of 300 or 400 shares, without margin, do you—for anybody without money?

A. No.

Q. You would not so deal.

A. I would not so deal.

By Mr. BURKE:

Q. I think I understood you to say you have had charge of the books of the office.

A. Yes.

(Signed) ROBERT C. DRAYTON.

Subscribed & sworn to etc.

219 *Deposition of Evans R. Dick.*

The said EVANS R. DICK, being first duly sworn by me as a witness to the said cause, previous to the commencement of his examination, to testify the truth as well on the part of the plaintiff as of the defendant- in relation to the matters in controversy between the said plaintiff and defendant-, so far as he should be interrogated, testified and deposed as follows:

Examination by Mr. BURKE:

Q. State your name, age, occupation and place of residence.

A. Evans R. Dick; 38 years of age; banker and broker; 111 South 21st street, Philadelphia, Pennsylvania.

Q. State whether you are a member of the firm of Dick Bros. & Co., and if so, state how long you have been a member of said firm.

A. I am a member of Dick Bros. & Co., and have been ever since the firm started in 1884.

Q. State in what business said firm of Dick Bros. & Co. is engaged; and state also the place where and length of time said firm has been so engaged in such business.

A. Bankers and brokers; the present office is 423 Walnut street; before that, 145 South Fourth street; before that, 147 South Fourth street, in the city of Philadelphia. They have been engaged
220 in the business of bankers and brokers, I think, since the year 1884; about twelve years or thirteen years.

Q. And you say you have been a member of that firm how long?

A. Ever since it started.

Q. State whether you know Richard C. Crawford and Edward A. Valentine, defendants in this suit, or either of them; and if so, how long you have known them or either of them, respectively.

A. I know them both. I should say I have known Mr. Crawford about three years, and Mr. Valentine about five years.

Q. State whether the said firm of Dick Bros. & Co. ever had any business transactions with the firm of Crawford & Valentine, a firm composed of the said Richard C. Crawford and Edward A. Valentine.

A. They had.

Q. State whether the said firm of Dick Bros. & Co. ever had any business transactions with the said firm of Crawford & Valentine, with reference to shares of the capital stock of the Metropolitan Traction Company.

A. They had.

Q. Have you a copy of your account with them, covering their transaction with you?

221 A. We have.

Q. Have you got it here?

A. It is here.

Q. Will you present it to us?

A. Yes; here it is. (Producing account.)

(The account after being examined by counsel for both parties, is offered in evidence by counsel for plaintiff, and is marked "Exhibit L."

222 A. We have.

Q. Will you present it?

A. I now present it. (Producing account.)

(The account is offered in evidence and marked "Exhibit L.")

Q. Is that which has just been exhibited a correct account of your transactions with the firm of Crawford and Valentine?

A. Yes, sir.

Q. What was the first transaction that your firm had with Crawford and Valentine, in Metropolitan Traction stock?

A. It was to pay for 450 shares of Metropolitan Traction which we received, for the account of Crawford and Valentine, from the firm of Valentine and McAvoy.

Q. You say that 450 shares of Metropolitan Traction stock was transferred from the account of Valentine and McAvoy, to the account of Crawford and Valentine, on June 30th, 1894?

A. Yes, sir.

Q. At whose instance or request was that transfer made?

A. It must have been at the request of Valentine and McAvoy, who were closing up their business and asked us to deliver the stock over to the firm of Crawford and Valentine, who would be responsible for it thereafter.

Q. Was this done with the knowledge of Crawford and Valentine?

A. It was.

Q. What was the next transaction in the account with Craw-

223 ford and Valentine—the next transaction of any kind?

A. The next transaction is the crediting of the account with a dividend received on 400 shares of Metropolitan Traction Company, amounting to $562.50. It is credited under the date of July 16th, 1894.

Q. Go on and give the different transactions as they occurred.

A. The next transaction was the purchase of five shares.

Q. Explain what that is.

A. The next entry in the account, do you mean?

Q. Yes, sir.

A. The next entry in the account or transaction is that of July 31st—interest at four per cent., $165.40.

Q. What was the next transaction?

A. The next transaction was August 27th—the purchase of five shares of Metropolitan Traction at 118 and commission—$590.31.

Q. What was the next transaction?

A. The transaction was on August 30th—we delivered five shares of Metropolitan Traction.

Q. What was the next transaction?

A. The next transaction was the purchase of 10 Metropolitan Traction, at 117½, on September 4th; $1175.63.

224 Q. What was the next transaction?

A. I will ask again for information. Do you mean a transaction in stocks or entries in the account?

Q. Transactions in stocks unless I ask for entries.

A. The next transaction seems to have been September 7th—10 shares of Metropolitan Traction was delivered.

By Mr. BROWN:

Q. When you say "delivered," what do you mean? To whom was it delivered?

A. Delivered out on the order of the owner. I would have to refer to another book to see whether it was delivered by a clerk by the registered mail or by express.

Q. Does it mean sold?

A. No; delivered out, given. By "delivered" we mean that we turn over the physical possession of the shares to somebody having the right to receive them.

Q. At the order of Crawford and Valentine? Is that what you mean?

A. To the order of whoever may be named.

Q. But in this case?

A. In this case, under the instructions of Crawford and Valentine.

225 By Mr. BURKE:

Q. Do you know to whom these shares of stock, the 5 and 10, were delivered?

A. Yes, they were delivered to Crawford and Valentine.

Q. What is the next transaction?

A. September 7th—10 shares of Metropolitan Traction Company delivered.

The next is September 11th—10 Metropolitan Traction purchased at 118 and commission.

The next is September 13th—10 Metropolitan Traction delivered to Crawford and Valentine.

Counsel for defendants interposes an objection, viz., that it does not appear that the account here set forth is a transcript from the ledger of the company.

By Mr. BROWN:

Q. Is the account here an exact transcript from your ledger account? Does it show everything that your ledger account shows?
A. Everything.
Q. You did not make it yourself of course?
A. I checked it off carefully. You will see a check mark against every item there.

226 By Mr. BURKE:

Q. What is the next transaction?
A. The next is September 11th—10 Metropolitan Traction bought at 118 and commission; $1182.62.
The next is September 13th—showing 10 Metropolitan Traction Co. delivered to Crawford and Valentine.
The next is October 1st—50 Metropolitan Traction bought at 116¼; $5,828.12.
The next transaction is October 15th—200 Peoples Traction, sold at 55, $10,987.50.
Q. (Indicating at a point in the entry.) Sold short, is it?
A. (Again reading entry.) "Oct 15th—200 Peoples Traction sold short at 55, $10,987.50."

Counsel for defendants interposes an objection, viz: If the witness is simply stating what the entries upon the ledger account are then the account will speak for itself; if he is giving the transactions, objection is made to the counsel for plaintiffs suggesting any addition to what the witness says.

Q. What is the next transaction?
A. The next is October 17th—200 Peoples Traction sold short, $54.25—$10,837.50.

227 Counsel for defendants objects to the witness saying "sold short" unless he explains the meaning of the phrase.

Q. State what "sold short" means.
A. It means selling the stock before we have received it from a customer for delivery to the purchaser. And until such delivery is made by the customer to us we are compelled to furnish it ourselves.
Q. Go on and give the next transaction.
A. The next was October 22nd—50 Peoples Traction bought (account of short) at 53½ and commission; $2,678.13.
The next was October 25th—100 Metropolitan Traction sold, at 109; ¼ less commission; $10,918.75.
The next was October 30th—100 Metropolitan Traction, bought at 109 and commission; $10,906.25.
The next transaction was December 18th—200 Peoples Traction, bought account of short; 54 and commission; $10,812.50.
The next transaction was December 19th—50 Peoples Traction, bought at 54 and commission; $2703.13.

Q. Do you mean fifty shares?

A. Yes.

The next transaction was December 20th—100 shares
228 Peoples Traction, bought at 52¾ and commission; $5,281.25.

The next was January 9th; cash, account of Yorkshire terrier for R. C. Crawford, $125.

The next was January 11th—200 Metropolitan Traction, sold at 100¼ less commission; $20,137.50.

The next transaction was January 14th—200 Metropolitan Traction sold 101½ less commission; $20,287.50.

The next transaction was January 28th—50 Metropolitan Traction bought at 96 and commission, $4,803.12.

The next transaction was January 28th—150 shares Metropolitan Traction, bought at 97 and commission; $14,559.37.

The next transaction was January 28th—150 Metropolitan Traction, bought at 98 and commission; $14,709.37.

The next transaction was January 28th—50 Metropolitan Traction sold at 94¼ less commission; $4709.38.

The next transaction was January 28th—50 Metropolitan Traction, delivered Toland Brothers: $4700.

The next transaction was January 29th—300 Metropolitan Traction sold at 90⅛ less commission; $27,018.75.

The next transaction was February 5th—50 Metropolitan Traction, bought at 99 and commission; $4953.12.

The next transaction was February 4th—50 Metropolitan Traction sold at 100 less commission; $4996.88.

229 The next transaction was March 14th—50 Metropolitan Traction sold at 96¾ less commission; $4834.38.

The next transaction was March 29th—50 shares Metropolitan Traction, bought at 93 and commission; $4653.12.

The next transaction was March 29th—50 shares Metropolitan Traction, bought at 92½ and commission; $4628.13.

The next transaction was April 17th—100 shares Metropolitan Traction sold at 89⅛ less commission; $8943.75.

That seems to end the account as far as transactions in securities are concerned.

Q. Please give the cash transactions in the account.

Counsel for the defendants requests the witness, in giving these, to explain what they mean.

A. On July 11th (or 16th) the account was credited with dividend on 450 shares Metropolitan Traction; $562.50.

On July 31st the account was charged with interest at 4 per cent.—$165.40.

Q. Interest on what?

A. On the account.

Q. On a balance of the account?

A. Yes.

230 Q. That interest was charged monthly, was it?

A. It was charged at the end of every month.

On August 31st the account was charged with interest at 3½ per cent.—$144.56.

On September 4th the account was credited with draft—$1000; that amount being a draft on the firm of Crawford and Valentine, of Chicago.

(By Mr. BROWN:)

Q. Was it paid by them?

A. It was paid by them.

On September 11th the account was credited with draft, $1000.

On September 30th the account was charged with interest at 3½ per cent.—$142.60.

On October 15th the account was credited with dividend on 500 Metropolital Traction—$625.

On October 16th the account was credited with cash from Dick, Bros. and Lawrence—$4,000.

Q. What does that mean?

A. It means cash paid by Dick, Bros. and Lawrence to us, $4,000.

Q. Explain the whole transaction.

A. Frequently, when we had occasion to ask Crawford and
231 Valentine for money, they would find it much more convenient to wire the money direct to the Chicago bank correspondents in New York, as the communications between Chicago and New York were very much closer and quicker than between Chicago and Philadelphia. They would pay the cash into Dick, Bros. and Lawrence, in New York, or the New York bank would pay it into Dick, Bros. and Lawrence, who in turn would advise us that they had received it for our account. In other words, it was cash remitted to Dick, Bros. and Lawrence, for our account, by Crawford and Valentine of Chicago.

Q. Now resume your statement of the items.

A. The next item is October 31st, interest at 3½ per cent., $152.94.

The next item is November 30th, interest at 3½ per cent., $147.21.

The next item is December 20th, cash to Dick, Bros. and Lawrence, paid to us for the account of Crawford and Valentine, $3,000.

On December 26th, cash from Dick, Bros. and Company, paid by Dick, Bros. and Lawrence to Crawford and Valentine, $1500. It is debited to Crawford and Valentine.

On December 31st the account is charged with interest at
232 3½ per cent., $149.70.

On January 9th the account is debited with cash—acc't of express on terrier—$2.20.

On January 15th the account is credited with dividend on 500 Metropolitan Traction—$625.

Q. On that day (January 15th) how many shares of Metropolitan Traction stock did you have and were you then holding and carrying for Crawford and Valentine?

A. We had 100 shares.

Q. But you have given them credit for dividends on 500 shares?

A. Yes.

Q. You had sold, on the 11th and 14th, 400 shares?
A. We sold on January 11th, 200; and on January 14th 200.
Q. Then you did not have 500 shares at the time you credited them, on January 15th, with $625 dividend?
A. No, we did not.
Q. I want you to explain how you come to credit the account with dividends on 500 shares when, on the day that you did credit them with the dividends, you had only 100 shares.
A. Because the dividend belonged to the man who owned
233 the stock at the time the books closed.
Q. When did the books close?
A. I do not remember.
Q. Did they close prior to the sale?
A. (After referring to data.) The books of Metropolitan Traction closed in the latter part of the month of December, the dividends being payable on the 15th of the following month.
Q. So that the seller, on the 15th of January, would be entitled to the dividends?
A. Provided he was so entitled at the time the books closed.
Q. Yes; the seller, at any time after the books closed and before the dividend was paid, would be entitled to the dividend?
A. He would.
Q. You say that you did collect the dividend on 500 shares on that day?
A. On that day.
Q. The sales on January 11th and January 14th, in other words, were ex dividend?
234 Counsel for defendants objects to the question as leading.
A. They were ex dividend.
Q. Proceed with your statement of the items.
A. The next item was this. The account was credited with cash, by check, on January 28th, $4,000.
Under date of January 30th the account is debited with draft, $1500.
On January 31st the account is debited with interest at 3½ per cent., $77.17.
The account is debited, under date of February 28th, with interest at 3½ per cent., $11.43.
The account is credited, under date of March 28th, with draft, $500.
Q. What was that?
A. That was probably a draft on New York, that they remitted us to mail; it was probably that. They paid us, on that day, $500 by draft.
The account was debited, on March 31st; interest at 4 per cent.—$7.86.
The account was credited, under date of April 1st, with draft—$1,000.
Q. Was that a draft drawn by you upon them?

235 A. It was either a draft drawn by us upon them or a New York draft that they would remit. It would depend very much on the course of exchange or the tightness of the money market. If we had telegraphed them, say, two days before, "Remit us $2,000," that would mean that that was a draft of theirs on Chicago or some bank of New York. Or sometimes, when a bank here would take a draft at par, we might deposit our draft on them. Anyway it was a credit of $1,000 that they paid us.

Q. Proceed.

A. Under date of April 18th the account was charged, debited, with a draft of $1,000. We paid that.

On April 13th the account was charged with interest at 4 per cent., $13.46.

Under date of May 21st the account was charged: to general account, $217.20. That closed the account.

Q. On whose order were the several purchases and sales to which you have referred made?

Counsel for defendants objects to the witness stating the contents of any written instrument, telegram, letter or correspondence; and asks to have the originals produced.

Q. Have you telegrams or letters from Crawford and Val-
236 entine giving instructions to you for each and every purchase and sale of Metropolitan Traction stock to which you have referred?

(The question is objected to by counsel for defendants as calling for the contents of written instruments which are not produced.)

A. I cannot state without looking them up.

Q. Did you ever make a purchase or sale of Metropolitan Traction Company stock, for the account of Crawford and Valentine, without any instructions from them about it?

(The question is objected to by counsel for defendants as calling for incompetent testimony, instead of asking what instructions were given and requesting their production.)

A. I cannot recall that without looking it up, but I don't suppose we did. We do not make transactions without authority at all times.

Q. State how many shares of the capital stock of the Metropolitan Traction Comaany the firm of Dick, Bros. and Company held and were carrying for the said firm of Crawford and Valentine on the following dates: June 30th, 1894; July 31st, 1894; August 31st, 1894; September 30th, 1894; October 1st, 1894; October 27th, 1894;
October 31st, 1894; January 10th, 1895; January 11th, 1895;
237 January 12th, 1895, January 13th, 1895; January 14th, 1895; January 15th, 1895; January 25th, 1895; January 29th, 1895; January 31st, 1895; February 28th, 1895; March 15th, 1895; March 16th, 1895, to March 27th, 1895; March 31st, 1895; QApril

1st and April 2nd, 1895; April 18th, 1895; April 19th, 1895; to the present time.

(The question is objected to by the counsel for the defendants as immaterial and irrelevant.)

A. I cannot answer the question off-hand. I can tell right away what I had at the end of each month; but you ask me as to every day.

Q. What did you have on January 30th, 1894?

A. On January 30th, 1894, we had 450 shares.

Q. On July 31st, 1894?

A. On July 31st, 1894, we had 450 shares.

Q. On August 31st, 1894?

A. On August 31st, 1894, we had 450 shares.

Q. On September 30th, 1894?

A. We had 450 shares.

Q. On October 1st, 1894?

A. Well, I will have to go and work all this account out. I don't want to answer off-hand.

Counsel for plaintiff states that he wants to have the amounts of the stock held and carried upon the dates before mentioned,
238 and suggests how they should be stated.

Counsel for defendants objects to counsel for plaintiff instructing the witness.

Counsel for plaintiff denies having given any instruction.

Counsel for defendants still objects to counsel for plaintiff making a statement to the witness.

COUNSEL FOR PLAINTIFF (to the witness): I wish you to look at those dates (indicating on "Exhibit L") and give the amounts.

A. I will say that, as soon as I can have the assistance of my bookkeeper, I will check off the items and can then answer as to those intermediate dates. I will answer at once for the dates at the end of each month.

(NOTE.—After a controversy between counsel at this point, the following is noted by request of counsel for plaintiff:)

"Counsel for defendants (Mr. Brown) is making certain statements to the witness upon the stand, which are as follows:

"If you are going to make any statement of how many shares your firm was 'long' for Crawford and Valentine, at a par-
239 ticular date, I shall desire, upon cross examination, to have you give a statement of how many shares your firm was 'long,' for them, at all intermediate dates. I do this in order to avoid unnecessary trouble for ourselves or for the witness."

By Mr. BURKE:

Q. You may defer stating the amount of stock held and carried upon the dates mentioned until you have an opportunity to make out a table.

A. I can answer now as to the end of each month because those have been checked off and proven.

Q. Then proceed.

A. (Referring to "Exhibit L.") October 31st, 500 shares, November 30th, 500 shares; December 31st, 500 shares; January 31st, 50 shares; February 28th, 50 shares; March 31st, 100 shares; April 30th, none. There was no transaction after that date in shares.

Q. What was the last transaction in Metropolitan stock with Crawford and Valentine?

A. The sale of 100 shares under date of April 17th, 1895.

Q. That was the closing out?

240 A. That was the last transaction in Metropolitan Traction stock in the account.

Q. After that you had none?

A. We had no shares of stock on hand for them.

Q. Does this exhibit ("Exhibit L") show how many shares of Metropolitan Traction stock you held and were carrying for Crawford and Valentine on each day from June 30th to April 17th?

A. It does—from June 30th, 1894, to April 30th, 1895.

Q. I believe you stated that, on December 31st, 1894, you had on hand and were carrying 500 shares of Metropolitan Traction stock?

A. We had.

Q. That on January 11th you sold 200 shares and, on January 14th, 200 more?

A. That is correct.

Q. And that, after making those sales, you had 100 left?

A. That is correct.

Counsel for defendants objects, that counsel for plaintiff shall, in his questions, state what the witness said and not his own deduction or inference from the account.

241 Q. What is the current market price of Metropolitan Traction stock now?

(The question is objected to as immaterial and irrelevant.)

A. About 108.

Q. Do you know, or have you any means of knowing, what the current market price of Metropolitan Traction stock was on June 30th, 1894?

A. I can find out by consulting the stock exchange books. You can proceed and, if I get the information, I will state it later.

(NOTE.—Subsequently the witness further answered:)

On June 29th, 1894, the price of Metropolitan Traction stock was 113½. On Saturday, June 30th, there was no transaction.

Q. You have had no transactions with Crawford and Valentine since April 30th, 1895?

A. Not since May 7th, 1895, I should judge from this account.

Q. But your last transaction in Metropolitan stock was April 17th?

A. The last transaction we had for them, in Metropolitan stocks, was April 17th, 1895.

Q. From June 30th, 1894, to the close of the account did
242 your firm render to Crawford and Valentine monthly statements of that account?

A. We did.

Q. How do those monthly statements compare with this exhibit ("Exhibit L") that has been introduced in evidence?

A. They should be exact copies.

By Mr. BROWN:

Q. That is, you mean that the statement should be exact copies of the monthly accounts as given in that exhibit?

A. Both of them should be exact copies or transcripts of our books. Therefore they should be the same.

Q. You mean that the account rendered each month would be exactly the same as the statements between the red ink lines on this exhibit?

A. That is what I mean.

By Mr. BURKE:

—. At the end of each month those accounts were rendered to Crawford and Valentine?

A. Those accounts were pasted together on a sheet; the end of one month touching the beginning of the next month.

Q. They were sent separately for each month?

A. They were sent separately for each month.

243 Q. Did Crawford and Valentine ever make any objections to those monthly statements rendered to them?

A. None that I remember.

Q. Would you be very likely to know the fact if there were any objections made to the account?

A. Yes. I might say it would be impossible for me not to know.

Q. And they made none to your knowledge?

A. To the best of my recollection and knowledge they made none.

Q. Look at the letter now shown you, dated July 2nd, 1894, and state whether that is a letter sent by Dick, Bros. and Company to Crawford and Valentine.

A. Yes, sir; I received it.

(Ques. repeated.)

A. I suppose it is. It looks like it.

Q. Is that a letter from your office to them?

A. It looks like it.

Q. Do you recognize the writing?

A. I recognize the signature.

Q. Whose signature is it?

A. That of W. A. Dick, my brother, a member of the firm. I do
244 not care to recognize the letter, as it contains interlineations in ink; that is why I qualify recognizing it. I could prove it by the letter book probably. (After referring to letter book

the witness adds:) I do not find that interlineation on the copy in the letter book. The rest of the letter is correct.

Q. What is written in the letter is not an interlineation is it? Do you mean the writing here?

A. I mean the writing put in there, in ink.

Q. Yes, the words inserted with a pen instead of by the typewriter. What words are they?

A. (Reading from letter:) "Under date June 30, 1894;" which is written with a pen.

By Mr. BROWN:

Q. As I understand it, you do not know whether that was in the letter when it was sent or not?

A. I don't know whether that was sent, or put in by Crawford and Valentine, or not.

(A copy of the letter referred to, dated July 2nd, 1894, from Dick Brothers & Co. to Crawford and Valentine is introduced in evidence and marked "Exhibit M." Counsel for plaintiff and defendants stipulate that a copy of the said original letter, as produced, may be here inserted with the same effect as though the said original had been introduced. The following is the copy:)

245 EXHIBIT M.

"Members of New York, Philadelphia and Chicago stock exchanges.

(M.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *July 2nd*, 1894.

Messrs. Crawford & Valentine, 118 La Salle street, Chicago, Ill.

DEAR SIRS: Under instructions from Messrs. Valentine & McAvoy we have transferred account formerly kept in their name on our ledger to an account which we have to-day opened in your name, statement of which has already been forwarded under date June 30/94.

Wishing the new firm every success, we are,

Yours very truly, DICK BROS. & CO."

(NOTE.—The heading of the above is in print and the remainder of the letter in typewriting, except the signature and the words "under date June 30/94," which are in writing.)

By Mr. BURKE:

Q. Have you your letter press copy books of January, 1895?

A. I have (Book produced.)

Q. (Indicating in book.) I ask you if this letter, dated January 10th, 1895, is a statement, sent by Dick Brothers & Co. to Crawford and Valentine.

A. Yes, sir.

246 (A copy of the original letter referred to is offered in evidence and marked "Exhibit N." By agreement of counsel said copy is admitted, in place of the original, with the same effect as though the said original had been introduced. Said copy is here inserted as follows:)

EXHIBIT N.

"Up-town office, 206 and 208, Betz building.

"Members of New York, Philadelphia and Chicago stock exchanges.

(N.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *Jan'y 10th*, 1895.

Messrs. Crawford & Valentine, Chicago, Ills.

DEAR SIR-: In accordance with your instructions, we have this day sold for your account and at your risk, 200 Metropolitan Traction a 100¾

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL."

Q. I ask you if the letter which I now present, dated January 11th, 1895, is a letter sent by Dick Brothers & Company to Crawford and Valentine.

A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit O." Under the same agreement said
247 copy is admitted, in place of the original, with the same effect as though the said original had been introduced. Said copy is here inserted as follows:)

EXHIBIT O.

"Up-town office, 206 and 208, Betz building.

"Members of New York, Philadelphia and Chicago stock exchanges.

(O.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *Jan'y 11th*, 1895.

Messrs. Crawford and Valentine, Chicago, Ills.

DEAR SIRS: In accordance with your instructions, we have this day sold for your account and at your risk, 200 Metropolitan Traction a 101½

Yours truly,

DICK BROS. & CO."

Q. I ask you whether the letter which I now present, dated January 25, 1895, is a letter written and sent by Dick Brothers and Company to Crawford and Valentine.
A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit P." Under the same agreement said copy is here inserted as follows:)

248 EXHIBIT P.

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchanges.

(P.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *Jan'y 25th*, 1895.

Messrs. Crawford & Valentine, Chicago, Ills.

DEAR SIRS: In accordance with your instructions, we have this day bought for your account and at your risk,

150	Metropolitan Traction	a 98
150	do.	a 97
50	do.	a 96

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL.

P. S.—We note you are remitting direct

$3500 we to credit # 2 ..... $4,000
" debit grain a/c..... 500."

Q. I now present you a letter, dated January 26th, 1895, and ask you if that is a letter written and sent by Dick Brothers and Co. to Crawford and Valentine.
A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit Q." Under the same agreement said copy is here inserted as follows:)

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchanges.

249 EXHIBIT Q.

(Q.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *Jan'y 26th*, 1895.

Messrs. Crawford & Valentine, Chicago, Ills.

DEAR SIRS: In accordance with your instructions, we have this day sold for your account and at your risk, 50 Metropolitan Traction a 94¼.

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL.

P. S.—We note we are to deliver Toland Bros. and Co. on Monday 50 Met. Traction a 94."

Q. I now present you a letter, dated January 28th, 1895, and ask you if that is a letter written by Dick Brothers and Co. to Crawford and Valentine.

A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit R." Under the same agreement said copy is here inserted as follows:)

EXHIBIT R.

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchanges.

(R.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *Jan'y 28th*, 1895.

Messrs. Crawford & Valentine, Chicago, Ills.

DEAR SIRS: In accordance with your instructions, we have this day sold for yurr account and at your risk, 300 Metropolitan
250 Traction a 90⅛.

Yours truly, DICK BROS. & CO."

Q. I present you a letter, dated February 2nd, 1895, and ask you if that is a letter written and sent by Dick Brothers and Co. to Crawford and Valentine.

A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit S." Under the same agreement said copy is here inserted as follows:)

EXHIBIT S.

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchanges.

(S.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *Feb'y 2nd*, 1895.

Messrs. Crawford & Valentine, Chicago, Ills.

DEAR SIRS: In accordance with your instructions, we have this day sold for your account and at your risk, 50 Metropolitan a 100.

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL."

Q. I now present to you a letter dated March 28th, 1895 and ask you if it is a letter written and sent by Dick Brothers and Co. to Crawford and Valentine.

251 A. It is.

(A copy of the original letter referred to is offerec in evidence and marked "Exhibit T." Under the same agreement, said copy is here inserted as follows:)

EXHIBIT T.

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchanges.

(T.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *March* 28, 1895.

Messrs. Crawford & Valentine, Chicago, Ill.

DEAR SIR-: We have drawn on you to-day draft for $500 which we have credited your account 2 against purchase of 100 Metropolitan Traction stock.

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL."

Q. I now present to you a letter dated Jan'y 28, 1895, and ask you if that is a letter written by Dick Brothers and Co. to Crawford and Valentine.

A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit U." Under the same agreement, said copy is here inserted as follows:)

EXHIBIT U.

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchanges.

(U.) Dick Brothers & Co., 134c South Fourth street.

PHILADELPHIA, *Jan'y* 28, 1895.

252 Messrs. Crawford & Valentine, Chicago, Ill.

DEAR SIR-: Your favor of the 26th inst. received enclosing draft for $3,500. And as instructed we credited you in general account $4,000 and charged grain account $500.

Yours truly, DICK BROS. & CO."

Q. I present to you a copy of a letter dated March 28, 1895, and ask you if it is a letter written and sent by Dick Brothers and Co. to Crawford and Valentine.

A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit V." Under the same agreement, said copy is here inserted as follows:)

EXHIBIT V.

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchange-.

(V.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *March 28th*, 1895.

Messrs. Crawford & Valentine, Chicago, Ills.

DEAR SIRS: In accordance with your instructions, we have this day bought for your account and at your risk,

50 Metropolitan Traction a 93

50 do. a 92½

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL."

253 Q. I present to you a letter dated April 16th, 1895, and ask you if that is a letter written and sent by Dick Brothers and Company to Crawford and Valentine.

A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit W." Under the same agreement, said copy is here inserted as follows:)

EXHIBIT W.

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchange.

(W.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *April 16th*, 1895.

Messrs. Crawford & Valentine, Ch'go, Ills.

DEAR SIRS: In accordance with your instructions, we have this day sold for your account and at your risk, 100 Metropolitan Traction a 89¼.

Yours truly, DICK BROS. & CO."

Q. I now show you a letter of Feb'y 4, 1895, and ask you if that is a letter written and sent by Dick Brothers and Company to Crawford and Valentine.

A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit X." Under the same agreement, said copy is here inserted as follows:)

254 EXHIBIT "X."

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchange.

(X.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *Feb'y 4th*, 1895.

Messrs. Crawford & Valentine, Chicago, Ills.

DEAR SIRS: In accordance with your instructions, we have this day bought for your account and at your risk, 50 Metropolitan Traction at 99.

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL."

Q. I notice that in this letter of January 10th, 1895, you notify them of sale of 200 shares of Metropolitan Traction at par and ¼, and in your exhibit here you have it down as "January 11th." Explain why the dates differ.

A. Because the stock sold on the 10th is not delivered until the next day. It is not credited until it is delivered.

Q. Is that the same with purchases, that they are not charged until the day after?

A. Yes, sir.

Q. But suppose the sales are made on a Friday or a Saturday. When then is the credit or charge made?

A. Unless they are made for cash, it is on the following Monday?

255 Q. So that this sale that was made on January 10th of 200 shares, at par and ¾, was not delivered until the next day?

A. Not until the next day.

Q. On which day you gave them the credit?

A. We then gave them the credit?

Q. How about this sale, referred to in the letter of January 11th, 200 shares of Metropolitan at 101½?

A. You will probably find that that was on a Friday?

Q. The stock referred to in the letter of January 11th, 1895, was not delivered, then, until when?

A. It was not delivered for three days.

Q. It was not credited until that time?

A. It was not credited until delivered.

Q. I ask you if there is any uniform rule or custom among brokers here in Philadelphia, with reference to the amount of deposit or margins or securiry that they require to be deposited with them upon the purchase or sale of stocks?

A. No, there is no uniform rule.

Q. Upon what, if anything, does the amount called for depend?

A. It depends on the character of the stock; it depends on the financial standing of t-e party for whom it is being carried. It also depends sometimes on whether the stock marked is in a feverish condition or a normal condition.

256 Q. I now present to you a letter, dated April 1, 1895, and ask you if that is a letter written and sent by Dick Brothers and Company to Crawford and Valentine.

A. It is.

(A copy of the original letter referred to is offered in evidence and marked "Exhibit Y." Under the same agreement, said copy is here inserted as follows:)

EXHIBIT "Y."

"Up-town office, 206 and 208, Betz building.

Members of New York, Philadelphia and Chicago stock exchange.

(Y.) Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *April 1st*, 1895.

Messrs. Crawford & Valentine, Chicago, Ill.

DEAR SIRS: We ship you tonight through bank 500 shares West Chicago stock with draft attached for $57,337.50.

We have also drawn on you for $1,000 account of Metropolitan Traction stock which we are carrying for your account.

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL."

Q. I notice that in this letter you say you have drawn on them for $1,000 on account of Metropolitan Traction stock? Was that the amount that you called for on that date?

A. I should think so.

Q. Was there any particular amount that you ever required Crawford and Valentine to deposit with you as margins on stock?

257 (Objected to as leading.)

A. My recollection is that we required $5.00 to $10.00 a share on Metropolitan Traction, according to the state of the market.

Q. But you did not always call for that, did you? (Objected to as leading and improper in form.) Did you always call for that from Crawford and Valentine?

A. We did not. If we had $10.00 a share and got $9.75 we would not call on a man but would let it run down a good way.

Q. Didn't it run down some time as low as $5.00?

(Objected to as leading and improper.)

A. It may have.

Q. I ask you if it did not sometimes run as low as $5.00?

A. That is a matter as to which I would not like to answer without looking it up, but I would not be at all surprised if it had.

Q. Did they respond by putting up margin and securities whenever you called upon them?

A. I think they did. They did always to some extent.

Q. When would it be convenient for you to get the figures for which I have called, viz; as to the amount, of stock on hand
258 at the particular dates named, a list of which I will give you?

A. I will ask my bookkeeper to make them up to-morrow.

(NOTE.—At this point the further examination of the witness was deferred until the following day, February 5th, 1897, when he was again examined and his deposition completed as follows:)

By Mr. BURKE:

Q. On January 11th, 1895, how many shares of Metropolitan Traction stock were you holding and carrying for Crawford and Valentine?

A. On January 11th, 1895, I was carrying 300 shares at the close of business.

Q. That was sold when?

A. That was sold on January 10th.

Q. On January 10th, 1895, after the sale of the 200 shares, how

many shares then remained in your hands, that you were holding and carrying for Crawford and Valentine?

(Counsel for defendants objects.)

A. I have just answered that question. After the sale of January 10th there were 300 left. You have asked the same question twice. You confuse in your mind the fact that the instant the stock is sold you do not take it out but it is delivered the next day.

259 Q. After the sale of 200 on January 11th, there were left how many?

A. There were only 100 left.

Q. That you were holding and carrying for Crawford and Valentine?

A. On January 11th we sold 200 shares more, which were delivered on Monday, January 14th; but after the close of business on January 14th we had but one hundred shares left for Crawford and Valentine.

Q. Pardon me for asking you again so as to avoid any misunderstanding. After the sale of the 200 shares on January 11th, how many shares, do you say, were you holding and carrying for Crawford and Valentine?

A. We were carrying 100.

Cross-examination.

By Mr. BROWN:

Q. I understand, in relation to the last question asked you by Mr. Burke, that you were carrying 300 shares from January 11th until January 14th. Is not that so?

A. We were carrying 300 shares from January 11th to January 14th; yes, sir.

Q. And that after January 14th, or upon the close of business on January 14th, you were carrying only 100 shares for the account of Crawford and Valentine?

A. That is right.

260 Q. Now, can you tell me how many shares of Metropolitan Traction stock you were carrying for the account of Valentine and McAvoy when their account was changed to the account of Crawford and Valentine, in June, 1894?

A. 450 shares.

Q. And you continued to be carrying 450 shares for the account of Crawford and Valentine until August 31st, did you not?

A. That is correct.

Q. Now, to make the questions more convenient, I will ask you whether you are speaking in the language of the business when you speak of being "long" or so many "short" for a particular account in carrying shares.

A. That is correct.

Q. You would say that upon the 31st of August you were "long" 450 shares for Crawford and Valentine, would you?

A. Yes, sir.

Q. Then you continued to be "long" up to September 4th, when you bought for Crawford and Valentine 10 more shares, did you?

A. When we bought ten more shares, yes.

Q. And were "long" 460 shares until 10 shares were delivered, which appear in your account as of September 7th?

A. That is correct.

261 Q. And then were "long" 450 shares until you bought, for their account, 10 more shares, which appear under date of September 11th?

A. That is correct.

Q. And then were "long" 460 shares until you delivered 10 shares, which appears under date of September 13th?

A. That is correct.

Q. Then up to and including September 30th you were "long" 450 shares for Crawford and Valentine?

A. That is correct.

Q. Upon the 1st of October it appears that you bought 50 shares for their account; and when that was delivered to you you were "long" 500 shares for Crawford and Valentine?

A. Yes, sir.

Q. And upon the 25th of October you sold 100 shares for the account of Crawford and Valentine; and after that was delivered you were "long" 400 shares for Crawford and Valentine?

A. That is correct.

Q. And you continued to be "long" 400 shares until you purchased 100 more shares, which appears on the date of October 30th; when, after they were delivered to you, you were "long" 500 shares for Crawford and Valentine?

A. That is correct.

262 Q. I understand that, in all these cases, there is to be taken into account the fact that the stock bought is not delivered to you until the next day or, if sold, is not delivered by you until the next day; and that, if sold on Friday, it is not, in the natural course of things, delivered until Monday?

A. That is the usual course.

Q. Leaving that out of account, you would say that upon the 31st of October you were "long" 500 shares of Metropolitan Traction stock for Crawford and Valentine?

A. Yes, sir.

Q. And continued to be so upon every day up to the 30th of November, 1894.

A. That is correct.

Q. And also continued to be so upon every day up to the 31st day of December, 1894?

A. Yes, sir.

Q. And you continued to be so from the 31st of December up to and including the 11th day of January, 1895; upon which 11th of

January you delivered, for the account of Crawford and Valentine, 200 shares?

A. That is correct.

Q. I made a mistake heretofore in speaking of the de-
263 livery. These entries are made as of the date when the stock was delivered to you or by you and not as of the date on which the actual sale or purchase was made?

A. Yes.

Q. So that, in speaking heretofore of these dates, you can say absolutely that you were "long" upon the dates I have given you, in the amounts which you have stated?

A. According to our business uses we would be "long" on both dates. We consider that the party is "long" on the day the stock is bought, because while the cash is not passed our obligation to the broker with whom we have made the counter transaction is of course binding upon us. Therefore the obligation of our customer is binding to us. No cash entry is made in the account until the actual stock is handled and our check in payment or the seller's check in delivery is deposited or drawn, as the case may be; and in that case the cash entry is made in the party's account. But the liability begins with us from the instant the transaction is made on the broker's stock exchange, up to the time at which the check is deposited for which the stock is received.

Q. I understand that. Then at the close of business upon January 11th, 1895, you were "long" 300 shares for the Crawford and Valentine account?

264 A. Yes, we were "long."

Q. Upon the 14th you deliver-d 200 more shares, but from January 11th to January 14th you were "long" with 300 shares for the account of Crawford and Valentine?

A. Yes.

Q. After the sale upon the 14th and upon the close of business on the 14th you were "long" 100 shares?

A. At the close of business, on the 14th, I was "long" 100 shares.

Q. These 200 shares delivered upon the 14th were the sale that was made before?

A. The sale, I believe, made on the 11th.

Q. Now, from the 14th of January up to and including the 27th day of January you were "long" for account of Crawford and Valentine 100 shares of Metropolitan Traction?

Q. Well, you understand, in answering that I am simply answering from this account and ignoring the technicality as to whether the stock was bought, in the stock exchange, one, two or three days before delivery. I am answering with the understanding that I am avoiding that technicality.

Q. I so understand.

A. Then you are correct.

Q. Upon the 28th you bought for the Crawford and Valentine
265 account 350 shares of Metropolitan Traction, did you not?

A. We did.

Q. And sold fifty shares?

A. We sold fifty and delivered fifty.

Q. Then upon the close of business on the 28th, it would appear from this account, you were "long" 350 shares of Metropolitan Traction for the account Crawford & Valentine?

A. That seems to be correct.

Q. And upon the 29th it would appear that you sold, for account of Crawford and Valentine, 300 shares and, upon the close of business on the 29th, were "long" 50 shares?

A. Fifty shares. That seems to be correct.

Q. And you continued to be "long" fifty shares upon each day, up to the 4th of February, when you sold 50 shares for this account of Crawford and Valentine, and were even?

A. Yes.

Q. Upon the 5th of February you bought 50 shares of Metropolitan Traction for account of Crawford and Valentine and were, at the close of business on that day, "long" 50 shares?

A. That is correct.

Q. And continued to be "long" each day, up to March 14th, 1895, when you sold 50 shares of Metropolitan Traction for account of Crawford and Valentine, and were again even?

266 A. We were "long" 50 on February 28th, up to March 14th; that seems to be correct.

Q. And were even until March 29th, 1895, when you bought 100 shares of Metropolitan Traction for account of Crawford and Valentine, and were "long" 100 shares?

A. That seems to be correct.

Q. You were "long" 100 shares, each day, up to April 17th, 1895, when you sold 100 shares of Metropolitan Traction stock and made the account square?

A. That is correct.

Q. How long had the firm of Dick Brothers and Company been doing business with Valentine and McAvoy? I do not mean exactly but approximately.

A. Speaking from memory, I should say between two and four years.

Q. Is there now such a firm as Dick Brothers and Lawrence?

A. No, sir.

Q. Was there such a firm in 1895?

A. There was.

Q. What was that firm? I do not care for the names of the members of it particularly, but what was its business?

A. It was a firm of bankers and brokers doing business

267 in the city of New York.

Q. Of which the Dick Brothers, who are members of the firm of Dick Brothers and Company here, were members?

A. That is correct.

Q. Did they do business also with Valentine and McAvoy?

A. They did.

Q. Upon the New York exchange?

A. Upon the New York exchange.
Q. You say that that firm does not now exist?
A. That firm does not now exist.
Q. Are you members of a firm doing business on the stock exchange of New York?
A. I am.
Q. What is the name of that firm?
A. Dick Brothers and Company.
Q. It is the same concern that is doing business here?
A. It is the same partners who compose the firm here.
Q. When was that firm formed?
A. About a year ago.
Q. Then it was since the failure of Crawford and Valentine on May 20th, 1895?
A. It was since.
Q. Up to May 20th, 1895, was the firm of Dick Brothers and Lawrence doing business in New York?
368 A. No; the firm of Dick Brothers and Lawrence was succeeded in business by the firm of Dick Brothers and Wray. They were doing business.
Q. Were they doing business with Crawford and Valentine?
A. That is my recollection.
Q. Did the firm of which you speak, of which Dick Brothers were members, do more business from New York, with Crawford and Valentine than from Philadelphia or less?
A. Do you mean did Crawford and Valentine do more in New York than elsewhere?
Q. Yes.
A. Oh, very much more.
Q. They were very considerable dealers in New York, in stocks?
A. Yes, I would say they were considerable dealers.
Q. Was either member of the firm of Crawford and Valentine, do you know, a member of the New York stock exchange?
A. Yes.
Q. It was Valentine, wasn't it?
A. Archie Valentine was a member.
Q. The relations between the house here in Philadelphia and Crawford and Valentine were quite constant, were they not? There was a good deal of communication, I mean?
369 A. Between Dick Brothers of Philadelphia and Crawford and Valentine?
Q. Yes, and between Dick Brothers and Lawrence and Dick Brothers and Wray, in New York, and Crawford and Valentine?
A. Oh, yes.
Q. Was there a private wire communication?
A. There was.
Q. You say that this account which has been presented here is simply one account kept by Dick Brothers and Company, of Philadelphia, with Crawford and Valentine?
A. Yes.

Q. There does not appear in this account anything of the transaction in New York of the firm of Dick Brothers and Lawrence or that of Dick Brothers and Wray with Crawford and Valentine, save that there is an allusion to the drafts that came through?

A. Nothing.

Q. That is an entirely different account?

A. That is an entirely different account.

Q. Then there is another account here I think you told me?

A. There is another here.

270 (Mr. Brown calls for letters of Crawford and Valentine ordering these purchases and sales, if the witness, has them; and the latter communicates with his order clerk with a view to producing the same.)

Q. The other account between Crawford and Valentine and Dick Brothers and Company, which this exhibit does not cover, is, I understand you, an account simply of your dealings with Crawford and Valentine in Chicago?

A. That is correct.

Q. What were those dealings—in what sort of merchandise or business?

A. They were partially in grains and partially in some of the Chicago Traction stocks, as I recollect it.

Q. You mean by "Chicago Traction stocks" the street railway stocks?

A. Some of the street railway stocks.

Q. Concerning that, I notice in this exhibit a statement concerning People's Traction. What was the People's Traction stock?

A. That was one of our Philadelphia street railways.

Q. What is the Metropolitan Traction stock?

A. That is stock of a street railway in the city of New York.

Q. You do not know of course how Crawford and Valentine kept their books, so far as the accounts of Dick Brothers and
271 Company with them were concerned? Whether they separated the two accounts, as you did, you do not know?

A. I cannot speak from positive knowledge. I would imagine so because they would send us, at the close of each month, a copy of our account in Chicago, which we would check off; and I should say—that would be presumptive, if not positive,—that they kept them in the same way, just as we would send ours each month to them, in Chicago, and they would check them off.

Q. You were dealing in Chicago, with Crawford and Valentine as brokers, in your own name, I suppose, as Dick Brothers and Company?

A. As Dick Brothers and Company.

Q. Your dealings with them were for yourself or for your customers?

A. For our customers.

Q. As between you and your customers, you were dealing in Chicago upon your customers' instructions?

A. Yes.

Q. And you dealt with Crawford and Valentine in your own names?

A. Yes.

Q. Is that the custom of the trade, in brokers' business?

272 A. Yes.

Q. Then when Crawford and Valentine dealt with you, in Philadelphia, in stocks, did they deal in their own names?

A. In their own names.

Q. Did you know any of their customers or their principals in the transactions?

A. I have been introduced to men who said they were customers of theirs.

Q. Did you know, in any particular transaction, as to who they were who were dealing in stocks here?

A. My recollection is that Mr. Burke passed some time in Philadelphia; and he gave orders, if I recollect it, in Metropolitan Traction which, if I also recollect it, he had authority to do from Valentine and McAvoy or whatever the firm name was, the Valentine firm.

Q. That was before the time of Crawford and Valentine?

A. No, they both. I say "the Valentine firm." If I recollect it, wherever we executed an order of that kind we at once communicated over the private wire so as to post them at once as to what their customers were doing.

Q. Did you know anything about these particular transactions?

A. I cannot testify as to any particular transaction, no.

273 Q. You received your instructions, as to those transactions, from Crawford and Valentine and were dealing with them, were you not?

A. We considered we were dealing with Crawford and Valentine, although my impression is, as is often done where a customer of a firm goes to another city in which the firm is dealing, they would give certain general powers such as "you can let so-and so trade to a certain extent, say to 500 shares, according to the transaction, of his particular account.

Q. (Referring to items on exhibit.) Do you know of any one of these as to which that was so?

A. I cannot identify any particular one of those as having been given those instructions.

Q. Then you cannot say, as to any particular transaction here, that you know that Mr. Burke had anything to do with it?

A. I cannot identify any particular one.

Q. And you did not know for whom Crawford and Valentine might be buying?

A. Not generally.

Q. No, not generally as to any of these transactions. You would not know, for instance, if in January Crawford and Valentine

274 ordered Metropolitan Traction sold, whether they were ordering it sold because Mr. Burke was their customer or Mr.

Pullman was their customer or Mr. Yerkes was their customer or not?

A. No, I have no recollection of that at all.

Q. Have you any idea of when you met Mr. Burke in Philadelphia first?

A. No. I should say, if I recollect it, Mr. Burke came in with a letter of introduction from one of the Valentine firms. I do not recall whether it was Crawford and Valentine or the other. He was in Philadelphia, I think, several times. It seems to me I can recollect very well talking with him, sitting in our other office.

Q. Do you remember when?

A. I should say somewhere around two or three years ago. Can I refresh my memory by speaking to Mr. McCall about it?

A. Yes.

(A brief colloquy here ensued between the witness and the individual named by him.)

Q. Are you sure that you ever saw Mr. Burke before the failure of Crawford and Valentine, which took place in May, 1895?

A. Yes, I feel very confident.

Q. Can you come any nearer to it?

275 A. I might say I feel sure of it. It is rather hard to remember a person who makes no special impression upon you, one way or the other—I mean no disrespect to Mr. Burke here—and who merely exchanges courteous remarks.

Q. Did you trade for Mr. Burke outside of the Crawford and Valentine trades?

A. Not to my recollection. I would not like to say positively without consulting my books but not to my recollection.

Q. In the letter from you to Messrs. Crawford and Valentine, which has been introduced in the direct examination, "Exhibit Y," you say, "We ship you to-night, through bank, 500 shares West Chicago stock with draft attached for $57,337.50. We have also drawn on you for $1,000 account of Metropolitan Traction stock, which we are carrying for your account. Yours truly—*p. p.* Dick Brothers & Company—Geo. McCall.) Does this West Chicago stock transaction appear in this account? (Indicating Exhibit L.)

A. I believe not.

Q. Would it appear in the other account of which you speak?

A. It would appear in the other account.

Q. You dealt, then, quite largely through Crawford and Valentine in Chicago?

276 A. No, our account with them was not a very large one. The transactions were very intermittent.

Q. But at times of considerable amounts?

A. Yes, such as that particular transaction.

Q. What did Crawford and Valentine deal in, in New York?

A. All kinds of miscellaneous securities, stocks and bonds.

Q. Such as were usually marketable in New York?

A. Such as were active on the stock exchange in New York; such as Pullman, St. Paul, Rock Island, Reading and others.

Q. Were they accustomed, through you, in these stocks, both to buy and sell?

A. They were accustomed to both buy and sell?—yes.

Q. Did they sell "short"?

A. Sometimes.

Q. In all these transactions was it the custom or rule between you that the transactions should be kept margined by a sufficient margin?

A. Yes.

Q. In Metropolitan Traction stock what did you require, as a rule?

A. My recollection is from $5.00 to $10 per share.

277 Q. You said, in your direct examination, that you would sometimes perhaps not allow the margin to run under $10. I ask you whether, according to the custom, the usage, the nature of the business, it is possible at any time to take sufficient margin to make you sure or safe?

(Counsel for the plaintiff objects to the question as incompetent and irrelevant, in asking for what is "possible.")

Q. I mean, may the market break or advance so suddenly as to wipe out the margin before you can get at your customer?

A. Often. Sometimes there is a great fluctuation.

Q. So that you have to do the best you can toward keeping your margins with your customers, do you not?

A. We have to do the best we can.

Q. But you say it was your intention to keep this Metropolitan Traction margin at least $5 to $10?

(Objected to.)

A. Yes. I might express that better by saying that that was our business rule, which we lived up to as well as we might.

Q. Now, would it make a difference if you happened to be indebted to Crawford and Valentine for margins, in Chicago, upon this other account? Would you transfer from one account to the other?

A. I think we did several times. That is my recollection.

278 Q. You would transfer also, I suppose, from the New York account?

A. From New York, yes.

Q. So as to keep generally safe?

A. To keep generally safe.

Q. And they would do the same, I suppose?

A. They would do the same.

Q. Mr. Burke has offered certain letters here. I propose to offer certain others. I ask you to say whether the letter I now show you, of March 13th, 1895, is a letter from Dick Brothers and Company.

A. It is.

Q. The letter is as follows:

"Dick Brothers & Co., 134 South Fourth street.

PHILADELPHIA, *March 13th*, 1895.

Messrs. Crawford & Valentine, Chicago, Ills.

DEAR SIRS: In accordance with your instructions, we have this day sold for your account and at your risk, 50 Metropolitan Traction at 96⅜.

Yours truly,

p. p. DICK BROTHERS & COMPANY.
GEO. McCALL."

Is that the letter?

A. That is the letter.

By the way, looking at that recalls to me that I gave the ad-
279 dress, yesterday, as "145 South Fourth street." It was 134 South Fourth street.

Q. The commissioner has produced here, as having been returned to him by the receiver of Crawford and Valentine of Chicago, a package of papers, among which there appear to be seventeen memoranda of transaction-, or statements of accounts between Dick Brothers and Company and Crawford and Valentine. Are these the memoranda which were sent by Dick Brothers and Company to Crawford and Valentine?

(Counsel for plaintiff objects to the accounts or memoranda and any reference to them as not proper matter to be introduced on cross-examination; that the same would be a part of the defendant's case in-chief, which he cannot bring in on cross-examination.)

A. Yes, they are.

Mr. BROWN: They run from one to seventeen. I will ask the commissioner to mark them for identification, omitting the first one; of March 13, 1895, which I have just read in full.

(NOTE.—The memoranda referred to will be found annexed to this record of depositions.)

Q. According to your best recollection, were these memoranda sent with or without accompanying letters?

A. They are not supposed to be sent, in each case, with the letter. The letter goes the same day and inclosed in the same en-
280 velope but there is no necessity for it.

Q. Have you the correspondence in which Crawford and Valentine gave you the instructions for the transactions which you made for them here?

A. No, I believe we would not have.

Q. Why not?

A. The reason I have not before me these orders or memoranda is because after the account has gone unquestioned for a period of time, say about a year, we usually destroy them, as they accumulate too rapidly.

Q. Did some of those instructions come over the private wire, of which you speak, between Crawford and Valentine and yourself?

A. According to my recollection, practically all of them.
Q. Were such messages kept?
A. For some months.
Q. And then destroyed?
A. As far as I can tell, they have been destroyed.
Q. Were they letters confirming such telegrams?
A. I should suppose so.
Q. Have you destroyed any business letters within the last two or three years?
281 A. My bookkeeper tells me they were destroyed when we moved.
Q. How long have you been in the brokerage business?
A. About seventeen years.
Q. You know the customs of the trade in Philadelphia, I suppose.
A. I think I do.
Q. Is there a Philadelphia stock exchange?
A. There is.
Q. Of which you are members?
A. Yes, sir.
Q. The trading that was done in stocks and the trading shown by this Exhibit, ("L"), is it done upon the stock exchange?
A. Usually.
Q. And with other brokers?
A. Usually.
Q. As shown by this? (Indicating "L") I mean by "this" the transactions in account of Crawford and Valentine?
A. Yes.
Q. In so trading do you disclose to the persons with whom you trade the names of your principals or customers?
A. Never unless we are asked to do it.
282 Q. Did you in these cases? (Indicating on Exhibit L.)
A. Referring to the notices shown me, no.
Q. In purchasing or selling to other brokers, do you learn from them their principals or customers, or do you deal with them in their own names?
A. We deal with the broker himself.
Q. You do not know his principal or customer in the transaction?
A. No.
Q. In dealing with one broker, for different customers, may you have transactions both of purchase and sale with him, in the same stock, on the same day?
A. There are instances of it.
Q. In such a case what is the result of the trade, that is, between you and the other broker? Do the trades off-set each other, so far as they may?
A. They would.
Q. And to that extent the actual stock would not pass?
A. It would not pass.

Q. Is there a clearing house arrangement by which purchases and sales are off-set when they are not made with the same broker but with different brokers, in the same stock on the same day?

A. Yes.

Q. So that, according to the custom and the usage of trade
283 in buying and selling stocks in Philadelphia, upon the stock exchange, the question of the delivery or receipt of the actual certificates of stock and the number so received depends upon the aggregate amount of the particular broker's purchases as compared with the aggregate amount of his sales, does it not?

(Counsel for plaintiff objects to this line of examination as improper cross examination, in introducing matter that had not been touched upon in the direct examination.)

A. That is correct.

Q. Are there any particular certificates of stock, therefore, under such transactions, that can be identified as belonging to a particular trade, if there were several trades in that stock upon that day.

A. Usually it would be impossible to identify them.

Q. Would it always be so?

A. I would have to figure on that pretty hard before I could say "always." But it would be very difficult, if not impossible.

Q. Now, these certificates of stock which are delivered, received and passed from hand by brokers in Philadelphia—are they, as a rule, endorsed specially or in blank?

A. Invariably in blank.

Q. Does the person who endorsed the certificate bear any
284 relation to the trade generally or to the negotiation in which the stock passes?

A. Not often. It constitutes what is called a good delivery, under the stock exchange rules.

Q. That is, it may be endorsed by a person who is an entire stranger to the transaction and it may have passed through many hands after having been endorsed by him?

A. It may have after being endorsed by him.

Q. Were those certificates of stock transferred, and were these certificates of stock which were the subject of the trades in Exhibit L transferred upon the books of the Metropolitan Traction Company, after they came into your hands?

A. We almost invariable do that.

Q. To whom then are they transferred?

A. To ourselves.

Q. To Dick Brothers and Company?

A. To Dick Brothers and Company.

Q. And they stand then in your name?

A. Yes.

Q. Do they bear your endorsement when they pass out of your hands then?

A. They do.

Q. Is that the general custom or the custom of your particular house?

285 A. What you may call the better class of houses, those that have sufficient capital to make the transfers, prefer to have the stock as much as possible in their own name. It is more convenient for the collection of dividends or for voting on it; because, if you buy a thousand shares of Metropolitan Traction Company stock, you have to purchase it—say at to-day's purchase—at $108,000. If you do not want it transferred you can at once take those certificates to the bank and borrow $90,000 on them. If you want to have it transferred in your name you must send it over to New York, and it will probably be three days before the new certificates are returned, during which time you will have $108,000 locked up.

Q. Then the brokers, when carrying stocks or accounts for their customers, use the stock for the purpose of raising money upon it?

A. They do.

Q. Is there any custom of the trade by which they use the stock, in Philadelphia, by borrowing and lending it?

A. They do.

Q. What is that custom?

(Counsel for plaintiff interposes an objection, that this is improper cross-examination, as it is examining on matters that have not been called out in the direct examination.)

286 A. Where brokers need stock for the purpose of delivery and they do not happen to have it, either by reason of its being short sales——

Mr. BURKE: Before the witness answeres any further, I wish to ask, are there any rules of the stock exchange in reference to that.

Mr. BROWN: I object to the counsel interrupting the cross-examination.

The WITNESS (resuming and completing his answer):
—or from the fact that their customer has not yet delivered it to them, they then go to some one who has stock and borrow it from them, paying to the lender the market price of the stock at that time. This is, in effect, equivalent to borrowing money from the stock at its full market value.

Q. How do you mean "paying to the lender"—giving him the money?

(Same objection renewed.)

A. Giving him the money.

Q. And when the stock is returned the money is returned?

A. The money is returned.

Q. With interest or commission or what?

A. The interest or commission depends entirely on whether money is in demand or stock is in demand.

287 Q. Did that condition of things or of business prevail in New York also?

Mr. BURKE: I wish to have it understood that I interpose the same objection to each of these questions.

A. Yes.

Q. Do you remember what Mr. Burke said to you or any particular conversation you had with him when you saw him in Philadelphia?

A. Some years ago?

Q. Yes.

A. No.

Q. You do not remember whether he seemed to be acquainted with the stock market or not?

A. Yes, he talked about stocks in a general way, but I don't remember it.

Q. You do not remember how familiar he seemed with the course of business, the manner and modes of the business, do you?

A. I have only a general impression that he knew something about it but not as to how much.

Q. About Metropolitan Traction: What place is the general market for Metropolitan Traction stock?

A. Philadelphia.

288 Q. Is it a listed stock in Philadelphia?

A. I think not.

Q. Is it listed anywhere?

A. It is listed in New York and dealt in in the unlisted department in Philadelphia.

Q. How long has it been listed in New York?

A. I should say from a year to eighteen months.

Q. It was not listed during the time of the transactions that are set forth here in Exhibit L?

A. Not to the best of my recollection.

Q. At that time it was dealt in principally in Philadelphia?

A. I might say almost entirely.

Q. Do you or do other brokers in Philadelphia do business for brokers throughout the country, in other cities? Is it the custom?

A. We do when we can get it.

Q. Do those brokers deal with the brokers in Philadelphia, in their own names, or do they disclose their principals?

A. They practically never disclose their principals.

Q. What is the commission which is charged to those brokers, as a rule, for executing orders for them, in Philadelphia, by purchase and sale?

289 A. Our Philadelphia commissions law is a very complicated law, but the usual commission is about 12½ cents a share.

Q. Do you make any difference between the commissions charged to brokers and those charged to individuals?

A. On the major part of the securities dealt in in Philadelphia,

we can divide our commissions with the broker, in other words, charge him one-half of what we would charge a man who is not a broker.

Q. That is a general custom, is it?

A. That is on the majority of stocks.

Q. Then you charge them interest upon such money as you may have to use?

A. On such money as we advance.

Q. Monthly?

A. Monthly.

Q. If, therefore, a broker in another city should have a person order a broker in Philadelphia to buy stock of a certain kind and should have another person order him to sell the same stock, each transaction being in the name of the broker ordering it, what would be the showing upon the account of the broker in Philadelphia with the broker in the other city, so far as that stock was concerned? I mean that if A goes to Crawford and Valentine and has some
290 transaction with them in consequence of which Crawford and Valentine tells you to buy Metropolitan Traction stock, and B. goes to Crawford and Valentine and has some transaction with them in consequence of which Crawford and Valentine tells you to sell Metropolitan Traction upon the same day, what is the result on your account here with Crawford and Valentine?

A. The result is that we have the transaction recorded on the stock exchange, we put it on both sides of Crawford and Valentine's account and charge them in both ways.

Q. And the stock does not pass?

A. The stock does not pass.

Q. Therefore, in such a transaction as that, there would be no stock coming into your hands?

A. No stock would come into my hands.

Q. These certificates of stock which, by you, are transferred to your own name at the offices of the company are exchanged at the offices of the company, are they not, for new certificates of stock issued directly to you?

A. They are.

Q. That is the way in which the transfer is made?

A. It is.

Q. And they are kept by you in your name? You do not endorse them to your customers unless you are paid for the
291 value of them?

A. That is correct.

Q. And when you buy and sell for the account of any customer, broker or otherwise, during the time that the stock is being carried by you, under the arrangement of which you have spoken, it is in certificates issued to Dick Brothers and Company by the company, whatever it may be?

A. Usually.

Re-direct examination.

By Mr. BURKE:

Q. Is it always issued to you on stock purchased, by you, for the account of some other broker? Do you always have that stock transferred to your own name?

A. We do not.

Q. Is it not true that the certificates are so endorsed that they pass without any endorsement from you?

A. That is a question that it is impossible to answer. I might answer that possibly fifty per cent. of them have to be endorsed by us, seventy-five per cent. of them have to be endorsed by us, and twenty-five per cent. of them come in in such shape that they require nothing to be put on them by us.

Q. What proportion of the stocks in which your firm deals do you have transferred upon the books of the company that issued the stock?

292 A. I should say seventy-fice per cent., I think.

Q. You take it to the company and have the company issue new certificates of stock to you for seventy-five per cent. of the transaction?

A. That is a guess. I think so.

Q. How is it in dealing in St. Paul stock? Do you do it in St. Paul or Rock Island?

A. You must remember that we do not deal in St. Paul. That is a New York stock.

Q. Don't you deal in it here at all?

A. Very little.

Q. When you do deal in it don't you have it transferred to your own name?

A. If we were going to carry it, we would; yes.

Q. I say generally do you have it transferred to your own name?

A. If we were going to carry it we would.

Q. What proportion of the stocks of St. Paul and Rock Island do you carry?

A. I should say that seventy-five per cent. of the stocks we deal in we carry, and we have those transferred to our name.

Q. What do you mean by "carrying"?

293 A. We buy them for a person to hold them. If I am dealing in St. Paul between the markets, as we do a great deal, we do not carry that stock. It is not worth while to buy it in our name because we may buy it in Philadelphia and ship to New York to-morrow, but if we buy it in our own land, in New York, we ship it to Philadelphia and deliver it to-morrow. If you come into my office and tell me to buy 500 shares of St. Paul, give me the money, and I know you are going to carry it, I will have those 500 shares transferred in my own name.

Q. You said, in answer to a question asked you by Mr. Brown, that if a broker, a correspondent of yours, sends you an order to buy 100 shares of a certain kind of stock for one customer and also sends

you an order to sell 100 shares of the same kind of stock for another customer, you would do what in a matter of that kind?

A. I say that I would have the transaction recorded at the stock exchange and would send him——

Q. (Interposing.) On the order of the broker to purchase, you would go and purchase the 100 shares of stock?

A. I did not say that. You do not let me answer. I say I would have the transaction recorded on the stock exchange; I
294 would then send the broker a report, "We have bought and sold for your account 100 shares of (blank) stock, at (blank) price." I would then put the transaction through both sides of his account and charge him a commission on each side.

Q. When you would get his order first to purchase 100 shares of stock, you would go then upon the stock exchange, *it if* was open, and make the purchase?

A. No, I would not. I would have what is called "a wash transaction;" I would buy it and sell it myself.

Q. If then a person transmits to your firm here an order for a certain number of shares of a certain stock, you say you would not execute the order by purchasing the stock? I am now speaking simply of a purchase.

A. No; if a man sent me an order to buy 100 shares of stock and I could execute it, I would buy it.

Q. You would go on the exchange and buy it?

A. Yes.

Q. Then supposing later on the same day he sent you an order to sell that 100 shares of stock or a 100 shares of like stock, what would you do?

A. I would go there and sell it.

295 Q. If those were the only transactions, then, the broker's account would be closed?

A. His account would be closed.

Q. Suppose that a broker sends you an order to purchase 100 shares of a certain kind of stock—you say you would go upon the exchange and buy it?

A. I would.

Q. Then that stock would be deliverable to you the next day?

A. It would.

Q. Suppose that the same broker should send you an order, upon that day, the same day, to sell 100 shares of the same stock, you would go upon the exchange and sell that stock, would you?

Counsel for defendants objects, that the question is precisely the same as that asked before and already answered.

A. I would.

Q. Now, you would have upon the stock exchange a contract of purchase and a contract of sale?

A. I would.

Q. They might be two different brokers upon the exchange?

A. They might.

Q. You would have to deliver to one and receive from the other 100 shares of stock?

296 A. That is correct.

Q. And that stock would be actually passed to you?

A. It would.

Q. But as to the broker who sent his order to both sell and buy 100 shares of the same stock on the same day, his account would be closed and nothing would be going to him? Is that right?

A. That is right.

Q. Are there any printed rules of your stock exchange with reference to borrowing and loaning of stocks?

A. I do not think so.

Q. Do you know whether there are or not?

A. I think I would know if there was such a rule. That is a question of fact about which there is no need of guessing. I will get the rule for you, if there is one. (*After producing rules.*) There is a rule here. I did not know of it.

Q. You need not read it. I simply asked you if there was such a rule.

A. I did not know of it. It might just as well not be written there at all. But I had better correct my answer. I gave you a wrong answer.

Mr. Burke suggests a correction by striking out the first portion of the answer.

297 Mr. BROWN: I object. The witness having acknowledged that he gave an incorrect answer, it is too late to strike it out.

By Mr. BURKE:

Q. You said something about the transfer of money from the New York house to the Philadelphia house and from the Philadelphia house to the New York house, on account of brokers with whom you correspond. I ask you if any transfer of moneys or securities or margins from one house to the other are made without the orders of the parties concerned.

A. They are not.

Q. So that if, for instance, there was a transfer of money or security from New York to Philadelphia, on account of Crawford and Valentine, it would be on Crawford and Valentine's order, would it not?

A. We would never make a transfer for any one without their instructions, except in case of an insolvency, (we would then do it ourselves,) so that no transfer of that kind was made previous to their insolvency, without instructions. Whether one was made since or not I would have to look at the books to refresh my memory before I could answer.

Q. I ask you if there are any rules, or if there is any rule, of your stock exchange here, with reference to the clearing house and

298 the manner of transacting business on the clearing house.

A. There are.

Q. Have Dick Brothers and Company of Philadelphia, your firm, any individual account with either Crawford or Valentine, or have they ever had?

A. What do you mean by "individual account"?

Q. Has the firm of Dick Brothers and Company of Philadelphia ever had an individual account with Edward A. Valentine one of the defendants in this suit?

A. I have no recollection of it. I would want to consult my books before answering positively.

Q. I wish you would ascertain and tell me.

(NOTE.—After a pause, the examination proceeded. The question was answered later.)

Q. You say that your firm had two accounts with Crawford and Valentine—No. 1 and No. 2. They were entirely distinct, were they?

A. They were entirely distinct.

Q. No. 1 account embraced transactions that you had with Crawford and Valentine, in dealing in stocks, bonds, and grain in Chicago?

A. That is correct.

Q. That was what you call your account with them, was it, or their account with you?

A. We called that the account of Dick Brothers and Company with Crawford and Valentine.

Q. The other was the account of Crawford and Valentine with Dick Brothers and Company, and that involved transactions here in Philadelphia?

A. That is correct.

Q. There were no transactions in Metropolitan Traction stock entered in account No. 1, the account at Chicago?

A. I believe not.

Q. If your firm makes a purchase of a certain number of shares, say of 200 shares of stock, for a customer, upon a certain day, you say that your firm would then be "long" of that stock for that purchaser, from the time the purchase was made?

A. That is hardly the way that I would express it. I would not express it that way myself but that would convey the meaning probably. I would say that the man was "long" 200 shares with us, that the customer was "long" 200 shares with us.

Q. That is, he would be under obligation to take that stock?

A. Under obligation to take that stock.

Q. And if you sold, say to-day, 200 shares for a customer, without his having the stock, that would be a "short" sale, would it?

A. It would.

Q. He would be "short"?

A. He would be "short" on our books, 200 shares of stock.

Q. And you would be under obligations to carry out both those contracts?

A. We would.
Q. Both to the purchaser and to the seller?
A. Yes.
Q. Now, if a party had with you 100 shares of stock that had been bought; and he gave an order to-day to sell 100 shares, he having only 100 shares, then after the sale was made he would have no further rights to that stock?

(The question is objected to as leading and because, this being re-direct examination, the questions must not be made leading.)

A. No, if he gave an order to sell it he would have no further rights to it.
Q. After the order had been given to you to sell and you had made the sale, would he have any further rights in that stock?

301 (Objected to as leading.)

A. Not in that particular stock unless he had a dividend coming to him which had not yet been paid over.
Q. In answer to Mr. Brown you stated that the purchases and sales of Metropolitan Tractiin stock, as appear here upon Exhibit L, were made upon the dates given in that exhibit.

(Counsel for plaintiff objects that that was not the answer of the witness.)

Q. Do you mean to say that the purchases and sales of Metropolitan Traction stock were made on the dates that appear upon Exhibit L, which is before me?
A. I would like to see what I did say to Mr. Brown because I don't think I said that to him.
Q. Without referring to what you said to Mr. Brown, is that true that the purchases and sales were made on the dates which appear on this exhibit as those on which they were made?
A. They would not be likely to be made on the dates that are given on this exhibit, for the usual custom is to buy stock one day which is to be paid for on the following day. Therefore, unless a holiday or Saturday intervene, the natural sequence would
302 be that the transactions occurred one day ahead of the entry in the account.
Q. That is the usual course?
A. That is the usual custom. As far as I could, I explained that to Mr. Brown.

Mr. BURKE: Well, Mr. Brown explained it differently.
Mr. BROWN: Counsel for defendants objects to the statement of plaintiff's counsel and states that it is not correct. He insists that the matter was thoroughly gone into, fully explained and correctly stated by both the witness and himself. He objects to any further examination or going over of the same matter, as it was gone over in cross-examination.

Q. In answer to Mr. Brown you stated that your firm sold 200 shares of Metropolitan Traction Company stock on January 11th. Is that correct?

A. I would like to have the stenographer read it to me. I think they did. I think you will find that the 200 shares which I said were sold on the 11th were the 200 delivered on the 14th. The 200 shares sold on the 10th were delivered on the 11th; therefore they are entered in this account under the date of the 11th, that being Friday. Saturday was the 12th, Sunday the 13th and Monday the 14th.

Q. That is the way you first stated it to him.

303 A. That is the way I stated it to Mr. Brown. Did I not, Mr. Brown?

(NOTE.—After a controversy between counsel, concerning the witness' previous statement, the examination was resumed.)

Q. Look at Exhibit N and tell me when the sale in the item under date of January 11th, on Exhibit L, was made.

A. It appears from Exhibit N it was made on the 10th.

Q. Is that correct?

A. I should think so. I have no reason to doubt it.

Q. Now tell me when the sale appearing on Exhibit L, under date of January 14th, of 200 shares, was made.

A. I should say that that was made on January 11th, as per Exhibit O.

Q. You stated that on December 31, 1894, you had 500 Metropolitan Traction stock on hand for Crawford and Valentine?

A. Yes.

Q. Now the next transaction in Metropolitan Traction stock was on January 10th, was it not?

A. Yes.

Q. At the close of business on January 10th you had sold 200 shares of that 500 shares—is that correct?

A. That is correct.

304 Q. So that Crawford and Valentine would then have only 300 shares over which they had control, in your hands?

A. 300 over which they had control in our hands. They would have 200 shares over which they had no control, in our hands. Up to the time that stock was delivered we held the 500 shares.

Q. Now, at the close of business on January 11th—you having on that day sold 200 shares more—they would, on that day, have control of only 100 shares of Metropolitan Traction stock in your hands?

A. That is correct.

Q. Your firm of Dick Brothers and Company, of Philadelphia, have had no account with either Edward A. Valentine or Richard C. Crawford individually, since 1893, have you?

A. No.

Re-cross examination.

By Mr. BROWN:

Q. You have said that if you receive from a broker in another city an order to buy a certain amount of stock, you go upon the stock exchange and buy it; then if, later in the day, you receive from him an order to sell the same amount of stock, you would go upon the stock exchange and sell it; and that the two transactions would balance each other, upon your books, with the broker? That is the way I understood you to answer Mr. Burke. Was it not?

A. Yes—with that broker.

305 Q. Now I ask you: Supposing you received an order from the broker to buy a certain amount of a certain stock (he having given you that order because he had one customer who wanted stock bought) and you should receive from him at the same time an order to sell the same amount of the same kind of stock, (he giving you that order because he had some customer who wanted the stock sold,) what then would you do?

A. I can only repeat my former testimony. That is, I would do what, in stock exchange parlance, is called "I would cross the order;" I would go upon the stock exchange and record the transaction; I would then return to my office and report to the broker, "I have bought and sold for your account 100 shares of — stock at —;" I would place the transaction on one side of my purchase and sales book and the sale on the other side; I would charge his account with the purchase plus the commission and credit his account with the sale less the commission.

Q. Then, as I understand you, in that case, no stock would either come to you or be delivered by you?

A. In that case no stock would come to me or be delivered by me.

Q. If you received such an order to buy, and before you bought upon the stock exchange received from the same broker

306 (though not exactly at the same time but before you had executed your order to buy on the stock exchange) an order to sell the same amount of stock, would your course then be the same as you have indicated just now?

A. My course would be, if I could possibly do it, to do the same as I have indicated just now, in other words, to make the double commission.

Q. And without actually buying or selling the stock upon the exchange?

A. And without actually buying or selling the stock upon the exchange.

Q. So that when you told Mr. Burke that, if you received an order to buy a certain amount of stock, you would go and execute the order and then, when you received the order to sell, you would go and execute the sale order, you meant that that would be what you would do if you had bought upon the first order you received, before you received the second one, did you not?

A. Yes, sir.

Re-examined.

By Mr. BURKE:

Q. Do I understand you to say, then, that you do not always buy or sell, as the case may be, upon the order of a broker?

307 A. It depends on the nature of my instructions.

Q. Where you have two orders, one to buy and one to sell?

A. Suppose I have an order to buy 100 Metropolitan at 107 and it is selling at 108, I do not immediately execute the order. You see, it depends on the nature of my instructions. It is not for me to elucidate problems to learned counsel, but you two people are ignoring the stock exchange methods, that is all. If I had an order to buy stock at "best," I would then execute it as instantaneously as I could. If before I executed that order I received an order to sell 100 at "best," I would trade that myself naturally. There is the whole thing.

Q. Is that a usual occurrence or is it something that does not very often happen?

A. What do you mean—an order at "best"?

Q. No, but you get an order to sell and an order to buy the same kind of stock at the same time?

A. That very rarely happens. It happens sometimes.

(NOTE.—At this point a recess was taken until afternoon, when the witness was further examined as follows.)

Re-cross examination.

By Mr. BROWN:

Q. When, in the course of your examination, you have

308 given quotations of Metropolitan Traction stock at any particular day, from what did you take them?

A. They were taken either from the stock exchange official list of from the pages of the Financial Chronicle, which is the accepted authority, in our business, for quotations.

Q. What is the stock exchange official list? By whom is it published?

A. I do not know the printer. It is published under the stock exchange.

Q. Is it published by authority of the stock exchange?

A. It is published under a contract with them. They do not make any profit out of it.

Q. With the Philadelphia stock exchange?

A. A contract with the Philadelphia stock exchange.

Q. What is the Financial Chronicle?

A. The Financial Chronicle is a paper devoted to financial subjects, published in New York by W. B. Dana and Company, and is considered the accepted authority, among bankers and brokers, for quotations on stocks, monies, sterling exchange, etc.

Re-direct examination.

By Mr. BURKE:

309 Q. Are you sure that, at any time when I was in Philadelphia or elsewhere, I ever gave an order to Dick Brothers and Company to purchase or sell any stock whatever?

A. I am not sure of it. I have the impression you did but I could not be sure of it.

Q. In respect to what stock have you the impression that I gave an order to buy or sell?

A. I have an impression it was in Metropolitan Traction.

Q. Do you recollect at what time?

A. No, I cannot recollect anything more than a faint impression; which may or may not be correct. I would not think for one instant of making an affidavit that you had.

Q. You said, in answer to my question, earlier in your examination, the following. The question was, "What was the first transaction that your firm had with Crawford and Valentine in Metropolitan Traction stock." Your answer was, "It was to pay for 450 shares of Metropolitan Traction, which we received for the account of Crawford and Valentine from the firm of Valentine and McAvoy." What did you mean by saying that you paid for 450 shares? Did you mean anything more than that you transferred 450 shares from the account of Valentine and McAvoy to the firm of Crawford and Valentine?

310 A. No, it would mean only that we had owing us by the firm of Valentine and McAvoy that amount of money.

Q. A certain amount of money, you mean, do you not?

A. The amount of money mentioned by you.

Q. I did not mention any amount of money.

A. Well, then, a certain amount of money. And we had, as security against that, certain shares of stock.

Q. How many?

A. I will refer you to that account.

Q. Can't you answer it without referring to the account, after having been over it so many times?

A. Either 450 or 500 shares—(after referring to exhibit)—on examination of Exhibit L, 450.

Q. That you had on hand?

A. That we had on hand.

Q. For the account of Valentine and McAvoy?

A. (Continuing:) And we therefore paid out (which was done by an entry through our books) $48,290.49 to Valentine and McAvoy; which amount we charged to the account of Crawford and Valentine.

Q. Did you pay that amount of money or any other amount of money to Valentine and McAvoy?

A. I cannot answer whether we paid them any amount of money until I have looked to see how the account was finally closed up. I

do not suppose we did pay them that amount of money or that it was anything but a book entry.

311 Q. In other words, it amounted to nothing more than a simple transfer of that amount of shares to the account of Valentine and McAvoy?

A. That was the practical effect of it.

Q. You had that number of shares on hand at that time for Valentine and McAvoy?

A. We had, for Valentine and McAvoy.

Q. That is, on June 30th, 1894?

A. On June 30th, 1894.

Q. And that number of shares was transferred over to the account of Crawford and Valentine by your firm?

A. It was by my firm.

Q. And they controlled it after that, did they?

(Objected to as leading.)

Q. (Continuing:) Valentine and McAvoy?

A. Yes.

By Mr. BROWN:

Q. You mean by saying "controlled" that it was thereafter for the account of Crawford and Valentine?

A. It was thereafter, for the account of Crawford and Valentine, subject to their instructions.

Q. Subject to their instructions and such payments as it was necessary for them to make in order to get the stock?

312 A. That is correct—subject to the payment of our advances on them.

By Mr. BURKE:

Q. Did you hold that stock subject to the payment of those advances?

A. Well, we wouldn't give it up unless we were paid for it. If a bank loaned you money, on collateral, how would you dispose of the collateral? I could hardly answer your question.

(By Mr. BROWN:)

Q. You mean that it was in the ordinary course of the business, as has been described, that you held those shares for the account of Valentine and McAvoy, until June 30th, 1894, and that afterwards you held them for the account of Crawford and Valentine, to whose account they were transferred?

(The question is objected to as assuming something that has not been shown; also on the ground that the attorney for the defendant is telling, not asking, the witness what he means to say; and that it is improper cross examination.)

A. That is correct.

By Mr. BURKE:

Q. Referring to Exhibit L, I ask you this. Whatever stock Crawford and Valentine sold "short" appears, from this statement, to have been sold "short" does it? It is marked "short" is it not?

313 A. I should suppose it does.

Q. And on the debit side, where it is bought in, the account shows that it was bought in on account of short sales?

A. It does.

By Mr. BROWN:

Q. By which you mean that, wherever any stock was sold before an equal amount of that stock had been bought by you for the account of Crawford and Valentine, the sale is marked "short," do you not?

A. I cannot answer that yes or no.

Q. I am asking about what you meant by your answer to Mr. Burke's question.

A. I meant that where stock is sold by us which we do not have on hand, while the customer for whom we sell it is credited with the proceeds of it, yet we do not allow him any interest on those proceeds until the stock is delivered to us, and therefore, in order to enable our bookkeepers to keep the interest account properly, whenever stock is sold by us which we do not have on hand, the stock is at once marked in the book as "short." Now, that stock may come in by purchase or it may come in subsequently, by delivery, from some broker or the customer. Of course we do not know how it comes in.

Q. And you did not know, did you, so far as the sales which appear upon this Exhibit L are concerned, for whose account

314 Crawford and Valentine were selling the stock, except that they were selling it for their own?

A. We had no knowledge of anything behind them.

Q. So that you did not know, and you do not know, whether, in ordering you to sell that stock, they were attempting to execute an order given to them to sell short?

A. We would not have any knowledge upon that subject at all.

Q. You did not know anything about it?

A. We did not know anything about it.

Q. But in every case in which stock was sold, of which you were not carrying an equal amount for their account, it appears in this account as marked "short"?

A. It appears as marked "short."

By Mr. BURKE:

Q. When I (the plaintiff in this suit) was here in Philadelphia, about two years ago or so, you remember, I had some conversation in refcrence to Metropolitan Traction stock and you knew that I was interested in it at that time, did you not?

(Mr. Brown objects to the question as leading and as misstating what the witness has said.)

Mr. Burke asks to have the question stri-ken out.

Mr. Brown objects to either the question or the objection
315 stri-ken out.

(Question waived.)

Q. Do you remember having had a conversation with me, the plaintiff, about two years ago, in Philadelphia, with reference to Metropolitan Traction stock?

(The question is objected to as going over ground already traversed in the direct examination.)

A. I do.

Q. Did you know, at that time, that I was interested in Metropolitan Traction stock?

A. I did.

Q. Through the firm of Valentine and McAvoy and through Crawford and Valentine?

A. Through the Valentine firm or firms, whichever existed at that time.

Q. Do you remember whether or not I stated to you the number of shares in which I was interested?

A. I do not recall that.

Q. Did you know at that time, or did you ascertain from me at that time or from any other source, through what parties in Chicago I became interested in the stock?

A. No, I have no recollection of that.

316 Q. Did you or not know that Crawford and Valentine were acting as brokers for me, in Chicago?

A. I did.

Q. And that what stock I had was being carried by them?

A. I simply knew that they were carrying some stock for you. I did not know whether you were dealing with brokers outside of them or not, I knew nothing about it.

Q. You knew that they were carrying some Metropolitan Traction stock?

A. I knew that they were.

By Mr. BROWN:

Q. Didn't you say, in answer to Mr. Burke before, that all that you remembered about that conversation was a faint impression and that you did not wish to make an affidavit that ht had a conversation with you about Metropolitan Traction?

A. I would like to have that looked up, so that I may see what I did say.

(The answeres on this point were here read by the stenographer.)

Q. How definitely do you remember the conversation in which it appeared from Mr. Burke's statement that Crawford and Valentine had bought Metropolitan Traction stock for his account?

A. I can just remember the fact. I cannot remember any
317 special details. Where customers from other firms come to us, as they frequently do, bearing letters of introduction, we make it our business to find out in what security or securities they may be interested, so that we can give them information and post them on the course of the market.

Q. You do not know whether this was during the time of Valentine and McAvoy or the time of Crawford and Valentine?

A. I could not say unless I could find out in some way just at what period of time Mr. Burke was here.

Q. But you do not know now?

A. No, I do not remember.

Q. And you do not know for how many other people Crawford and Valentine were interested in Metropolitan Traction?

A. I have no knowledge of that at all.

Q. Nor how much they were interested for themselves?

A. I have no knowledge on that subject.

(Signed) EVANS R. DICK.

Sworn and subscribed before me this 10th day of February 1897.

WILLIAM M. STEWART, JR.,
Commissioner.

DR. *Messrs. Crawford and Valentine in Account with Toland Bros. & Co.* CR.

Date.			Date.		
1895.			1895.		
Jan. 29.	Pd. Hulin & G. *vs.* 300 Met. Trac.	$24,000.00	Feb. 4.	100 shs. Met. Tract. 100½	$10,018.75
30.	50 Met. Tract. at 92½	4,609.38		Balance	30,828.98
Feb. 1.	100 Met. Tract. at 96½	9,631.25			
4.	D'ft on acc't	2,500.00			
28.	Int. at 4 %	107.10			
		$40,847.73			40,847.73
M'ch 1.	Balance	30,828.98			
	Long 350 Met. Tract				

"PLAINTIFF'S EXHIBIT B."

DR. *Messrs. Crawford and Valentine in Account with Toland Bros. & Co.* CR.

Date.			Date.		
1895.			1895.		
M'ch 1.	Balance	$30,828.98	M'ch 14.	350 shs. Met. Tr. at 96¾	$33,840.63
14.	Int.	44.53			
	Balance	2,967.12			
		33,840.63			33,840.63
			M'ch 14.	Balance	2,967.12

"PLAINTIFF'S EXHIBIT C."

Messrs. Crawford and Valentine in Account with Toland Bros. & Co.

Dr.				Cr.	
Date.			Date.		
1895.			1895.		
M'ch 18.	D'ft a/c	$3,000.00	M'ch 14.	Balance	$2,967.12
			29.	Cash	32.88
		3,000.00			3,000.00

"PLAINTIFF'S EXHIBIT D."

Messrs. Crawford and Valentine in Account with Toland Bros. & Co.

Dr.				Cr.	
Date.			Date.		
1895.			1895.		
Jan. 29.	Pd. Hulin & G. 300 Met. Tract	$24,000.00	Feb. 4.	100 shs. Met. Tract. at 100	$10,018.75
30.	50 Met. Tract. at 92½	4,609.38	M'ch 14.	350 shs. Met. Tract. at 96¾	33,840.63
Feb. 1.	100 Met. Tract. at 96¼	9,631.25	29.	Cash	32.88
4.	D'ft on acc't	2,500.00			
28.	Int. at 4 %	107.10			
M'ch 14.	Int.	44.53			
18.	D'ft a/c	3,000.00			
		43,892.26			$43,892.26

319

"JAN'Y 29TH, 1895.

Messrs. Toland Bros. & Co., Phila.

"DEAR SIRS: We confirm instructions sent by wire to-day to receive from Messrs. Huhn and Glendenning 300 shares Metropolitan Traction stock and pay them $24,000 for our account.

Very resp'f'y,

(Signed) CRAWFORD & VALENTINE,
Per J. T. KILGOUR."

"M'CH 27TH, 1895.

"Messrs. Toland Bros. & Co., Phila.

"GENTLEMEN: Enclosed please find our check for $32.88 in payment of over-draft made on you which was caused by a clerk's error of $100 in footing. Pardon our mistake.

Very resp'f'y,

(Signed) CRAWFORD & VALENTINE,
Per J. T. KILGOUR."

"JAN'Y 29TH, '95.

"Messrs. Crawford & Valentine, 118 La Salle St., Chicago, Ills.

"DEAR SIRS: Confirming your telegram of to-day, we have paid Huhn & Glendinning $24,000 and have received from them 300 shares of Metropolitan Traction, which we charge to your account.

Yours truly,

(Signed) TOLAND BROS. & CO."

"FEB'Y 4TH, '95.

"Messrs. Crawford & Valentine, 118 La Salle St., Chicago, Ills.

"DEAR SIRS: We have this day paid your draft $2,500 and charge same to your account.

Yours truly,

(Signed) TOLAND BROS. & CO."

"MARCH 18TH, '95.

"Messrs. Crawford & Valentine, 118 La Salle St., Chicago, Ills.

"DEAR SIRS: We have this day paid your draft for $3,000 which we presume is all right, we have no advice from you of the same.

"As per statement sent you last Friday, your credit balance was $2,967.12, if you find this correct, please remit us your check for $32.88 and oblige,

Yours truly,

(Signed) TOLAND BROS. & CO."

"MARCH 27TH, '97.

"Messrs. Crawford & Valentine, 118 La Salle St., Chicago, Ills.

"DEAR SIR:—We have this day received your check for $32.60 in settlement of over-draft for which please accept our thanks.

Yours truly,

(Signed) TOLAND BROS. & CO."

"PHILADELPHIA, *Feb* 13, 1897.

"Messrs. Crawford & Valentine, Chicago, Ills.

"DEAR SIR:—Upon your order we have this day sold for your account and risk:

350 Metropol. Trac. at 96¼	33,862.50
Com.	21.87
	33,840.63

Yours truly,

(Signed) TOLAND BROS. & CO."

No. 2.

Standard and Valentine in Account with Dick Bros. & Co.

Dr.					Cr.			
1898.					1898.			
June	30.	400 Shs. Standard, balance from Valentine & Blackmer	$40,000	00	July	10.	Dividend on 400 Shs. Standard	$ 800	00
July	31.	Interest at 6 %	160	00			Balance	40,360	00
			$40,160	00				$40,160	00
July	31.	400 Shs. Standard, balance	$40,360	00	Aug.	20.	1 Shs. Trans. Co. (1/2 v. 2)	$ 25	00
Aug.	27.	1 Shs. Trans. Co. at 150 & C.	150	00			Balance	40,485	00
	31.	Int. at 6 %	150	00					
			$40,510	00				$40,510	00
Aug.	31.	401 Shs. Trans. balance	$40,485	00	Sept.	5.	Draft	$ 1,000	00
Sept.	5.	10 Shs. Trans. at 117½ & C.	1,175	00	Sept.	7.	10 Shs. Trans. (1/2 v. 2)	1,000	00
Sept.	11.	10 Shs. Trans. at 110 & C.	1,100	00	Sept.	10.	Draft		
Sept.	30.	Interest at 6 %	102	00	Sept.	10.	10 Shs. Trans. (1/2 v. 2)		
			$42,862	00			Balance	40,737	00
								$42,862	00
Sept.	30.	401 Shs. Trans. balance	$40,737	00	1899.				
Oct.	1.	10 Shs. Trans. at 110½ & C.	1,105	00	Jan.	15.	Dividend 401 Shs. Trans.	$ 802	00
Oct.	25.	40 Preferred Trans. at 1 (stock at 105) & C.	1,040	00	Jan.	15.	400 Preferred Trans. (stock at 10 %, C.)	40,000	00
Dec.	31.	401 Shs. Trans. at 108 & C.	43,283	00	Jan.	16.	Cash to C. C. & B.	1,000	00
Dec.	31.	Interest at 6 %	102	00	Jan.	17.	400 Preferred Trans. (stock at 105 & C.)	42,000	00
			$45,332	00	Jan.	31.	401 Shs. Trans. at 108½ & C.	43,416	00
							Balance	44,109	00
								$45,332	00

Oct.	31.	500 Met. Trac. balance	31 323 80	Oct.	31.	350 Peoples Traction, short	
Nov.	30.	Interest at 3½ %	147 21			Balance	31 471 01
			31 471 01				31 471 01
Nov.	30.	500 Met. Trac. balance	31 471 01	Nov.	30.	350 Peoples Traction (short)	
Dec.	18.	200 Peoples Trac. (a/c short) at 54 & C	10 812 50	Dec.	20.	Cash to D. B. & L.	3 000 00
Dec.	19.	50 do. at 54 & C	2 703 13			Balance	48 917 59
Dec.	20.	100 do. at 52¾ & C	5 281 25				
Dec.	26.	Cash from D. B. & L.	1 500 00				
Dec.	31.	Interest at 3½ %	149 70				
			51 917 59				51 917 59
Dec.	31.	500 Met. Trac. balance	48 917 59				
1895.				1895.			
Jan'y	9.	Cash a/c Yorkshire terrier for R. C. Crawford	125 00	Jan.	11.	200 Met. Trac. at 100¾ L. C.	20 137 50
Jan'y	9.	Cash a/c express on terrier	2 20	Jan.	14.	200 Met. Trac. at 101½ L. C.	20 287 50
Jan'y	12.	Cash to Dick Bros. & L.	1 200 00	Jan.	15.	Dividend 500 Met. Trac.	625 00
Jan'y	28.	50 Met. Trac. at 96 & C.	4 803 12	Jan.	28.	50 Met. Trac. at 94¼ & C.	4 709 38
Jan'y	28.	150 Met. Trac. at 97 & C.	14 559 37	Jan.	28.	50 Met. Trac. del'd Toland Bros. & Co.	4 700 00
Jan'y	28.	150 Met. Trac. at 98 & C.	14 709 37	Jan.	28.	Cash by check	4 000 00
Jan'y	30.	Draft	1 500	Jan.	29.	300 Met. Trac. at 90¼ L. C.	27 018 75
Jan'y	31.	Interest at 3½ %	77 17			Balance	4 415 69
			85 893 82				85 893 82
Jan'y	31.	50 Met. Trac. balance	4 415 69	Feb.	4.	50 Met. Trac. at 100 L. C.	4 996 88
Feb'y	5.	50 Met. Trac. at 99 & C.	4 953 12			Balance	4 383 36
Feb'y	28.	Interest at 3½ %	11 43				
			9 380 24				9 380 24
Feb'y	28.	50 Met. Trac. balance	4 383 36	Mar.	14.	50 Met. Trac. at 96¾ L. C.	4 834 38
M'ch	29.	50 Met. Trac. at 93 & C.	4 653 12	Mar.	28.	Draft	500 00
M'ch	29.	50 Met. Trac. at 92½ & C.	4 628 13			Balance	8 338 09
M'ch	31.	Interest at 4 %	7 86				
			13 672 47				13 672 47

M'ch	31.	100 Met. Trac. balance	8 338 09	Ap'l	1.	Draft	1 000 00
Ap'l	18.	Draft	1 500	Ap'l	15.	Dividend 100 Met. Trac	125 00
Ap'l	30.	Interest at 4%	13 46	Ap'l	17.	100 Met. Trac. at 89½ L. C	8 943 75
		Balance	217 20				
			10 068 75				10 068 75
May	21.	Cash to general acc't	217 20	Ap'l	30.	Balance	217 20

E. & O. E.

DICK BROS. & CO.

21—247

No. 1.

Dr. *Chicago Title and Trust Company, Receiver of Crawford & Valentine, in Account with Crawford and Valentine.* Cr.

Ap'l	30.	Balance	236 79
May	7.	Gain 15m Sept. wh't	353 13
			589 92

321 JANUARY 4TH, 1901—10 o'clock a. m.

Court met pursuant to adjournment.

JOHN E. BURKE, the plaintiff herein, having been recalled on his own behalf, was further cross-examined by Mr. Brown, and testified as follows:

Q. Mr. Burke, you spoke about going to the office of Crawford & Valentine and there demanding that the stock be delivered to you, and that you would pay the money. That was upon the 21st day of May, was it?

A. You assume in your question something that I did not say.

Q. Then correct it. I did not have any intention of doing so. What did you do?

A. I said I went to defendants' office on the morning of May 20th, 1895, and gave an order to have my Metropolitan Traction stock sent on from Philadelphia to this place, to be taken up here and paid for. That is what I said.

Q. And at that time had you heard that the firm of Crawford & Valentine had failed?

A. No, sir, I had not.

Q. What had you heard about it that induced you to go there?

A. I heard that there was some difficulty between the partners; what it was I was not able to learn, and did not learn, but

322 that there was some difficulty or trouble between the partners over financial matters.

Q. Mr. Burke, when you got there didn't you find an agent of the Chicago Title & Trust Company as receiver in there?

A. No, sir, he was not there; he did not come there until between 11 and 12 o'clock that day.

Q. What time were you there?

A. I was there about 9 o'clock in the morning.

Q. Who did you say that you talked with?

A. J. H. Larue, there, and talked with him.

Q. Who was he?

A. He is an employee in their office and was their telegraph operator, who transmitted orders for the purchase and sale of stock.

Q. Who was he?

A. You asked me who he was, and I am telling you.

Q. You talked with him before you gave that order, wrote that order, didn't you?

A. I talked with him when I gave the order, of course.

Q. Didn't he tell you of the failure of the firm, and that a receiver had been appointed?

A. Not until after that. He never told me that that firm had failed and a receiver had been appointed, no, sir.

Q. What did he tell you at the time you gave this order?

A. At the time I gave this order he said he would send it, and requested me to write out the form of an order to be sent on to Tolman Brothers & Company and Dick Brothers & Company.

323 Q. Who requested that?

A. He requested me to write out the form of the order which he was to transmit to them to have that stock sent on.

Q. Did you receive from the receiver a statement of account?

A. From the receiver? I received a statement of purchases and sales of Metropolitan Traction stock.

Q. Have you got it?

A. Sir?

Q. Have you got that?

A. Not here, no, sir. I received a statement of purchases and sales of Metropolitan Traction stock. That is the only statement I received. I did not receive it from the receiver. I received it from J. T. Kilgore, who, I understood, was appointed by the receiver, by the representative of the receiver, to help close up the affairs of the firm.

Q. They had, I think, as you explained, an item, an entry, purporting to show a closing of the account.

A. No, sir.

Q. Of the sale of stock?

A. No, sir, no, sir, no, sir.

Q. What did you say about that? Didn't you say that the receiver did undertake to make an entry, that you were closing the account and showing the sale?

A. I said nothing about that that I remember.

Q. I think you said something about that. Is that the fact?

A. The books, the ledger, my account on the ledger, shows that it was closed by the receiver.

324 Q. Where is that ledger? (Ledger is produced.)

A. In my direct examination I said nothing about the closing of my account that I have any recollection of.

Q. I think you did, Mr. Burke, but it is in relation to the damages. Your ledger account is on page 585 of this ledger?

A. Yes, sir.

Q. This is the account which you say is it?

A. Yes, sir.

Mr. BROWN: I would like to offer that page of the ledger in evidence, your honor, in connection with this cross examination. With that, as far as I am concerned, I am through.

Mr. PENCE: We object to it.

Mr. BURKE: It is hardly time on cross examination for them to introduce evidence. We have not introduced the books at all yet.

Mr. BROWN: On cross examination.

The COURT: You read from them all day.

Mr. BURKE: But we have not introduced them, any of them.

The COURT: But you said on direct examination that you knew certain things that occurred by reason of the fact that they appeared in the books.

Mr. BURKE: And they cross examined me in regard to those entries.

The COURT: And you cited the books as corroborative of the things you said occurred.

325 Mr. MORAN: Of course they can offer them when they call their witnesses.

Mr. BROWN: It avoids a little trouble. I do not propose to cross examine Mr. Burke any further upon it. I would like to introduce his ledger account in this ledger, pages 528 and 585.

Mr. PENCE: I simply object to it until the time comes to offer the ledger. I don't think it is proper here on cross examination.

Mr. BROWN: I would like to offer them in connection with the cross examination. Mr. Burke has referred to the account several times.

The COURT: He stated on the direct examination that he had personal knowledge, and on cross examination it appeared that his personal knowledge was derived from the books. He introduced certain portions of the book to show that. I think that is competent.

Mr. BROWN: I introduce pages 528 and 585 of this ledger which contains the account of John E. Burke.

Mr. PENCE: Have you shown by the witness that it is correct, or anything of that kind?

Mr. BROWN: They are the books of Crawford & Valentine. This balance here is $7404.52; and also the sales there. I have no objection to his stating.

Mr. PENCE: I think you ought not to offer that which has
326 been entered in afterwards. You ought to make the exception yourself of anything that has been entered after it passed out of the hands of Crawford & Valentine.

The COURT: I don't think the entry of the receiver has anything to do with the matter.

Mr. BROWN: Certainly it does not affect the rights of the parties; I admit that.

Mr. PENCE: I object to the introduction of it particularly because there are entries there made subsequent to the failure.

The COURT: I will sustain the objection.

Mr. BROWN: I will omit the entries upon May 22nd. He has himself testified on direct examination that the receiver made a book entry closing the account.

The COURT: In his direct examination?

Mr. BROWN: Yes.

The COURT: What is your recollection about that?

Mr. PENCE: Mr. Burke knows; I do not recall it.

The WITNESS: I am disposed to think that I did say so.

The COURT: That makes it competent then. That is, the matter referred to.

Mr. BROWN: This account, these red ink entries of Mr. Burke, upon page 585, of the date of May 21st, were, as we understand, made by the receiver, were they not?

A. That is what I understand.

327 Mr. PENCE: The red ink, of course, will not go into the record.

Mr. BROWN: All the entries of May 21st,—all entries subsequent to May 13th.

The WITNESS: That is what I understand.

Mr. PENCE: Were made by the receiver.

Mr. BROWN: Were made by the receiver. It is admitted by the counsel for the defendants that the entry of May 21st, in the account of John E. Burke, which appears as follows: "May 21, 5500 Met. Trac. 95 $52,181.25," was made by the receiver, and that it does not represent an actual sale of Metropolitan Traction stock, but is an entry made by the receiver for the purpose of closing the account, in which he took the market price of the stock at that date and credited Mr. Burke with it.

Mr. PENCE: You admit also that there was no stock on hand of the Metropolitan Traction Company at that date?

Mr. BROWN: I don't know. What you have proven is your case.

Mr. PENCE: Well, but you do not contest the question that all that stock had been disposed of?

Mr. BROWN: I certainly do contest the question that there was any stock to dispose of.

Mr. PENCE: Then you can easily admit there was nothing on hand of the Metropolitan Traction Company's stock.

328 Mr. BROWN: There was not any stock. Crawford & Valentine never had any stock, nor Mr. Burke either.

Mr. MORAN: Crawford & Valentine didn't have any, but Mr. Burke had some.

Mr. BROWN: You don't expect me to admit upon the record your theory of the case?

Cross examination.

By Mr. VROOMAN:

Q. I want to understand, Mr. Burke, more clearly about the nature of the transactions in the beginning; how you ordered your stock, how you paid for your stock, if you paid for it. Take the 450 shares of Metropolitan stock that was on hand at the time this firm was organized.

Mr. MORAN: I object to that question because it has nothing to do with the parties, how he got it originally, whether it was in the hands of McAvoy & Valentine and Jamieson & Co.

The COURT: They have a right to ascertain whether or not as a fact the stock was there at that time.

Mr. MORAN: Oh, well, if that is all.

Mr. VROOMAN: Will you explain how that came to be?

A. How the stock came to be?

Q. Yes.

A. Came to be what?

329 Q. Came to be yours, as you claim. How did you order it?
A. I bought it.
Q. You placed an order for it, didn't you, with somebody?
A. I did.
Q. With whom?
A. I placed the order first with Valentine & McAvoy to buy this stock for me.
Q. That is, you went into their office and told them to buy 450 shares of Metropolitan stock for you; is that it?

Mr. MORAN: I object to that question as entirely immaterial.
Objection overruled.

A. Yes, sir, I went into their office and I gave them an order to buy at different times Metropolitan Traction stock for me which amounted—the number of shares which they bought for me on my order amounted to 450.

Mr. VROOMAN: Amounted to 450 shares?

A. 450 shares Metropolitan Traction stock, which they purchased for me through their correspondents, Dick Bros. & Co., of Philadelphia.
Q. Now you knew that it was purchased by them through Dick Bros. of Philadelphia?
A. I did.
Q. Now you paid nothing, as I understand, when you made that order?
A. You don't understand correctly.
Q. Did you advance them anything to buy that stock with when you gave them the order?
A. I did.
Q. For what purpose?
A. For the purpose of paying on that stock, making a payment, what they called a margin.
330 Q. You put up what was called a margin; that was a small proportion of the amount. How much on a hundred?
A. I don't remember now the amount.
Q. How much on a share?
A. I don't remember now.
Q. You can give us some idea, can you not, Mr. Burke?
A. I can not remember whether it was $1,000 or $2,000 that I first paid them, and I kept paying them money from time to time on this stock.
Q. You margin the stocks?
A. Well, that is what it was called, a margin. It was a payment on the stock.
Q. Now of the principal sum due on the stock you made no payment?
A. I did.
Q. Except as margins?

A. And they made credits on their books for it. I supposed I got credit.

Q. I mean did you take any money into your office to pay in the principal sum that was due on this stock or did you make your payments credits that came to you on their books through various transactions?

A. I will tell you just how I paid it. I paid a certain amount of money as margins and payment on the stock which I ordered them to purchase for me.

Q. Those you call payments on margins, do you not?

Mr. MORAN: No matter what they are called; that makes no difference.

Mr. VROOMAN: Yes, I think it does.

331 A. I know what I call them. I don't know what you would call them, or what somebody else would call them.

The COURT: Not what you would call it; what did you call it? What did you say and what did they say?

A. I paid them so much money on the purchase; whether the word "margin" was used, or it was called margin, I don't now remember; but I know I paid so much money on the transaction.

Mr. VROOMAN: Mr. Burke, you knew it was to margin the stock, didn't you?

A. I did.

Q. It was not necessary to talk about it; you knew it?

A. That was my understanding of it.

Q. Now from time to time you were requested to put up some more money to margin it, were you not, as the stock went down?

A. I did put up more; I don't know as I was required to.

Q. You did that to margin the stock?

A. To margin and pay on the stock.

Q. You were called upon to pay margins?

A. I say I do not remember whether I was called upon, but I know I did pay further moneys as margins on that stock, and as payment on the stock that I purchased through them.

Q. Those payments were made in small sums, were they not?

A. Not very small sums.

Q. Well, one or two thousand dollars?

A. I don't call those small sums, do you?

332 Q. Yes, relatively. They would be large sometimes. Relatively they were small as compared with the amount of the indebtedness?

A. Yes, sir.

Q. The indebtedness was something like between $40,000 and $50,000 for that stock?

A. What was that?

The COURT: For the full price of the stock?

Mr. VROOMAN: For the full price of the stock.

A. I bought it at different times and in different amounts.

Q. Do not quibble about it. The whole indebtedness for that stock amounted to between $40,000 and $50,000?

A. Yes, sir.

Q. Now you kept track of the market, didn't you, yourself?

A. Sir?

Q. You kept track of the market, didn't you, yourself?

A. I did look after it.

Q. And you noticed whether it was necessary to margin your stock, didn't you?

A. I have no recollection about it now, Mr. Vrooman.

Q. And when you paid money in, if you did, from time to time, you did it with a view of margining the stock, didn't you, in accordance with the market, all the time?

A. I did it with a view of margining and paying for the stock as I had the money.

Q. Well, put it that way. Now the bulk of this indebted-
333 ness was due at the time of the transfer from the old firm to the new, wasn't it?

A. What?

Q. This indebtedness was due, if we call it an indebtedness, at the time of the transfer of the account from the old account to the new?

A. There was a certain amount of indebtedness from me to the firm of Valentine & McAvoy at the time of their dissolution and at the time of the formation of the new firm of Crawford & Valentine.

Q. Nothing was paid at that time, at the time of the transfer?

A. Just at that time?

Q. Yes, sir.

A. No, I have no recollection of anything being paid.

Q. And the whole transaction was a book transaction between the new firm and the old, and between you and the new firm? It was entirely a book transaction?

A. I do not so understand.

Q. No money was paid at that time?

A. No money was paid by me at that time.

Q. No money was paid to the new firm by the old, was there?

A. I don't know that there was.

Q. This stock that you bought from time to time while you were dealing with McAvoy & Valentine, this stock remained in the possession of Dick Brothers of Philadelphia, as I understand?

A. Well?

Q. If there was any stock purchased it remained in the possession of Dick Brothers, did it?

334 A. That was my understanding, that it was held there by Dick Brothers & Company in Philadelphia for Crawford & Valentine.

Q. It was held by Crawford & Valentine, as I understand your

testimony, and the deposition read, Dick Brothers knew nothing of you in the deal at that time?

A. At that time I don't think they knew anything about me.

Q. That stock was held by Dick Brothers as collateral to the indebtedness of McAvoy & Valentine, was it not?

A. That is my understanding of it.

Q. That is, they didn't pay for the stock either; they ordered it purchased by the Philadelphia brokers?

A. They ordered it purchased by the Philadelphia brokers.

Q. And the Philadelphia brokers bought it and held it, we will say, as collateral to an indebtedness which McAvoy & Valentine owed them on the stock?

A. I don't know.

Q. You so understood it, didn't you?

A. My understanding of it was that the stock was held there by Dick Brothers & Company.

Q. Answer my question. It is very simple.

A. Evidently you want me to say something that I do not know.

Q. No, I don't.

A. I beg your pardon.

Q. Didn't you understand all the time that the stock was held by Dick Brothers as collateral to an indebtedness owing to Dick Brothers by McAvoy & Valentine?

335 A. I have said that yes, before. I said that before.

Q. Now the transaction after the change from the old firm to the new, continued to be the same, didn't it, in character? There was no difference in the manner in which the business was done, as far as you know?

A. I don't know whether the business was done by the new firm exactly as by the old firm or not.

Q. I do not say exactly. I say the general character of it, and the business generally ran——

A. I can tell you how I understood the matter was after the transfer.

Q. There was no substantial change in the manner of doing the business after the transfer to the new firm as it was done by the old?

A. I don't understand what you mean, or understand by the manner of doing the business.

Q. The manner in which the stock was held.

A. I understand the stock was held by Dick Brothers & Company for Crawford & Valentine after the transfer of the stock from Valentine & McAvoy to Crawford & Valentine.

Q. And the same indebtedness was carried along over against the new firm by Dick Brothers & Company.

A. That I knew nothing about.

Q. That you understood?

A. I didn't understand anything about it whatever.

Q. That was the fact, wasn't it?

A. I see from the books——

336 Q. What I am getting at is this: This stock all the time during this transaction was held there by Tolman Brothers or Dick Brothers as collateral to an indebtedness of Crawford & Valentine for the stock?

A. The Metropolitan stock which Dick Brothers & Co. had and the Metropolitan stock which Tolman Brothers & Co. had for Crawford & Valentine, I understood to be held there in Philadelphia.

Q. As collateral to the indebtedness of Crawford & Valentine to one of those firms?

A. I supposed that they held it as security for whatever Crawford & Valentine might owe them; and as to the amount, I know nothing about it.

Q. That is the stock in which you claim an equity in yourself?

A. It is stock that I claim to own.

Q. That stock was not segregated by any other stock or certificates, was it?

Objected to.

A. I don't know.

Q. You never——

The COURT: I think he has already testified that he never saw the stock, and does not know its number, and does not know the date of the certificates.

Mr. VROOMAN: Well, that covers that.

Q. Now I understand you had a running account with McAvoy & Valentine during the time you were dealing with them?

A. Dealing with whom?

337 Q. McAvoy & Valentine.

A. Valentine & McAvoy, you mean.

Q. Yes, sir.

A. I had an account with them.

Q. A running account?

A. A running account, I suppose,

Q. In which you were debited and credited with moneys you paid in and credited up with stocks bought by you, whatever it might have been, and charged up with indebtedness on the stocks in the same manner as the books were kept?

A. My account I suppose shows a debit and credit.

Q. The same as in the case of this later firm of Crawford & Valentine?

A. I don't know that it was just the same, no, sir.

Q. Oh, Mr. Burke,—I mean substantially the same. It ran along the same?

A. With all debits and credits with both firms, but whether it was substantially the same, you cannot get me to say that, because I don't know.

Q. We won't quibble about it.

A. Well, put your questions so I can answer them from correctly from what I know, and I will do so.

Q. Now you had monthly reports from the old firm, did you?
A. I did.
Q. And you had monthly reports from the new firm of Crawford & Valentine?
A. I did.
Q. From the time it organized up to the time it failed, or nearly so?
A. Yes, sir.
Q. So you knew each month how your account stood?
338 A. Yes, sir.
Q. A part of those monthly accounts you have here in court?
A. Yes, sir.
Q. You have not them all?
A. No, sir.
Q. You were noticed, weren't you, to produce them all?
A. No, sir.
Q. Weren't you served with a notice by myself to produce all the monthly accounts with the old firm or with the new?
A. No, sir, I was served with notice to produce my accounts with Valentine & McAvoy.
Q. Have you produced them?
A. No, sir.
Q. Have you them with you?
A. No, sir.
Q. Where are they?
A. I think they are in my office.
Q. You were notified to produce them?
A. I was notified to produce my accounts with Valentine & McAvoy.
Q. That is the monthly statements?
A. I have forgotten now the wording of the notice.
Q. Why haven't you brought them with you?
A. Simply I have not brought them because I do not think they are competent evidence in this case.
Q. That is for the court to rule on.
A. Yes, or that you would introduce secondary evidence of the contents.
Q. Then you refuse to produce them here, do you?
A. I do not.
339 Q. Will you produce them?
A. I do not say that I will, until the question is settled by the court whether I am compelled to produce them. Without an order of court I shall not produce them.
Q. Now it appears by depositions——
Mr. MORAN: I understand these accounts relate to the accounts of McAvoy & Valentine?
A. Valentine & McAvoy.
Q. Which have been spoken of?
A. Yes, sir.
Q. And not to Crawford & Valentine?

A. Not the accounts in this case.

Mr. PEECK: We have produced six monthly statements in the case of the defendants Crawford & Valentine.

A. We have produced the monthly statements of account rendered to me for the months of October, November and December, 1894, and January, February, March and April, 1895. The accounts which Mr. Vroman spoke of now as requiring me to produce are my accounts with Valentine & McAvoy, which have nothing to do with this case whatever.

The COURT: The examination is being conducted by Mr. Vroman first in relation to the McAvoy matter, and secondly in relation to the Valentine & Crawford. The last questions related to Crawford & Valentine, but you have produced all those except those of July and August?

Mr. PEECK: I believe so.

340 The COURT: You started dealing with the new firm in July?

A. July.

The COURT: He has produced them all except July and August.

A. And September.

Q. And September?

A. No, that is right, July and August.

Mr. PEECK: How high had the market price of Metropolitan Traction stock been May 20th, 1895?

A. 287.

Q. What is the market price now?

A. Upwards of 170.

Q. At the time they called upon you for the margin of $200 do I understand you to say that they did not have any stock on hand for yourself, that they had disposed of all of it prior to that time?

A. All, with the exception of 50 shares. That is the only Metropolitan Traction stock on the first day of April. That is the only Metropolitan Traction stock the defendants had in their possession or under their control belonging to me or anybody else.

Mr. MORAN: You or anybody else; that is all they had?

A. Yes, sir.

Mr. PEECK: I will read in evidence the deposition of Evans H. Black. I offer this deposition, and all the exhibits referred to or identified therein, and if I did not offer yesterday I will now read depositions which I have read of Mr. Drayton, all the exhibits therein cited and attached thereto.

Said depositions and exhibits are as follows:

341 WILLIAM C. NEILSON, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Burke and testified as follows:

Q. What is your name and business?

A. William C. Neilson, vice-president of the Chicago Title & Trust Company.

Q. Do you remember about the time that the firm of Crawford & Cantine, in this city, suspended payment?

A. I remember the circumstance, yes.

Q. Were you an officer of the Chicago Title & Trust Company at that time?

A. I was.

Q. Was the Chicago Title & Trust Company appointed receiver in the case of the defendants Crawford & Cantine?

A. Yes, they were appointed receiver of Crawford & Cantine.

Q. State, Mr. Niblack, how and by whom and under whose direction was the accounting the books of Crawford & Cantine made after the receiver took possession?

A. We were principally. Under my charge and by the receiver.

Q. Did you employ anybody to assist you in closing up the accounts?

A. Yes, sir, we employed Mr. Joseph Kilgore and a young man by the name of Campbell, was it, or something of that kind.

Q. James J. Campbell?

A. Yes, sir, James J. Campbell. They were at work for Crawford & Cantine.

Q. Do you know Charles L. Boyd?

A. I know Charles L. Boyd.

Q. Who was he?

A. He was at that time an assistant in the trust department of the Title & Trust Company.

Q. Did he have anything to do with the closing up?

A. Yes, sir, I put him in charge of it to superintend the closing of it.

Q. At the time of the suspension or failure?

A. Yes, sir.

Q. State whether there was any kind of theft among the assets of Crawford & Cantine turned over to the receiver.

A. No, there was none.

Q. State the total amount of claims filed with and allowed by the master?

Objected to by counsel for defendants as immaterial.

Mr. Bogue: We wish to show the financial condition of the defendants at the time of their failure. We wish to show their financial condition as bearing on the question of the solicitations and acting on the question of intent.

The Court: The financial condition at the time of the failure could not be in issue. These transactions as much you claim were six or eight months before that.

Mr. Bogue: Taken in connection with other evidence [illegible]

Mr. Bogue: We wish to show at the time of the transaction had with the defendants in this case the defendants were insolvent, which is a very important thing in this case.

The Court: This question need not be asked it.

Mr. Bogue: I would like to have that in as an important element in this case, that the defendants were insolvent.

Mr. PENCE: We consider it a very important branch at the time.

The COURT: Not at the time of the failure.

Mr. PENCE: If we establish insolvency at one time and then show their condition prior to that time it tends to show they were insolvent at this time. There was some period of time when they became insolvent, and this is a starting point. Now if we can trace that back to the very beginning of their transaction January 29th, 1895.

Mr. BURKE: That they were insolvent on the 6th day of July, and they kept increasing and increasing and increasing.

The COURT: I will sustain the objection.

Mr. MORAN: It will save time if you admit it.

Mr. BROWN: Mr. Burke would deny that they were insolvent at all.

The COURT: I sustain the objection. I think it is incompetent to show what their condition was at the time of the failure.

344 Mr. MORAN: The offer is to prove this at this time, and prove by other evidence in connection with it that they were insolvent at the time of this transaction.

The COURT: Their is a proper way to prove their insolvency at the time of the sales.

Mr. MORAN: Not only at that time, but at the time of this occurrence. They were always insolvent at all times.

The COURT: I will let you prove that, but I don't think their insolvency May 20th, the year following, would indicate that.

Mr. MORAN: The amount of indebtedness against their estate proved up tends to show their indebtedness at that time, the fact of the creating of the indebtedness. We will show their condition at that time as compared with their assets. It is only a remote way of proving insolvency. Insolvency like any other fact can be proved by any evidence tending to show it and competent to show it. We want to prove up the indebtedness proved against them at a certain date, and take that indebtedness and carry it back. It is only a step along from the starting point. That is the only reason that I think it is competent, your honor. Standing by itself it is of no consequence at all.

Mr. PENCE: Suppose this indebtedness they owed at the time of the failure was created prior, and that alone made them insolvent.

345 The COURT: Do you expect to prove that?

Mr. PENCE: Yes, your honor.

Mr. BROWN: I don't see how it is competent as bearing on this question.

The COURT: It may show or fail to show they were actuated by fraudulent intentions at the time of the transactions.

Mr. BROWN: What has that to do with it? Suppose as a matter of fact that disastrous speculations had taken place two days or three days before this failure, or two weeks or three weeks, what effect would it have? The whole history of this firm undoubtedly at the time was very largely solvent when they were on the right side of the market, and when they were speculating they were unfortunately

insolvent. Now, suppose they prove that they were solvent at this day, solvent one day and insolvent the next, as frequently happens.

The COURT: Counsel states that he expects to prove the indebtedness existing at the time of the insolvency was long prior existing.

Mr. BROWN: Then we will have to put in all the books and transactions of this firm from the beginning. These gentlemen won't for one moment claim that they are going to do that.

The COURT: Upon the promise of counsel let him answer.

Mr. BURKE: We will show it.

Mr. BROWN: Then we have a right to go into other transactions of theirs to contradict it.

346 Mr. BURKE: State the total amount of claims filed with and allowed by the receiver.

A. The total amount?

Mr. BROWN: I thought the objection to that was sustained.

The COURT: Upon the statement of counsel that they expect to prove that the indebtedness existing at the time of the failure was indebtedness existing prior to these transactions I will let him answer.

To which ruling of the court the defendants, and each of them by their counsel then and there duly excepted.

A. It is about $140,000.

Mr. BURKE: I wish you would give the exact figures.

A. I could not do it without referring.

The COURT: That is near enough.

Mr. BURKE: He can do it right there.

Objected to by counsel for defendants.

A. $142,089 I think was the amount of the indebtedness.

Q. What was the amount?

A. That was the amount I think. Yes, sir, that is my best recollection as refreshed by this report.

Q. Does that report show that?

A. Yes, sir.

Q. State what was the total amount realized by the receiver out of the assets of Crawford & Valentine?

Mr. BROWN: All this is objected to by counsel for defendants.

To which ruling of the court the defendants, and each of
347 them, by their counsel then and there duly excepted.

A. It was about $25,000.

Mr. BURKE: I wish you would give it exactly.

A. I can by referring to the papers. (Witness refers to paper.) $25,917.

Q. That was the total amount?

A. *If* the receipts.

Q. Realized by the receipts?

A. Yes, sir.

Q. What is the total amount of the disbursements made by the receiver?

A. We disbursed ultimately all of that money.

Q. What per cent. was paid by the receiver as dividends to the creditors on claims filed.

The COURT: That is immaterial whether it was well managed or mismanaged.

Mr. BURKE: State whether there were any bad or uncollectible accounts among the assets?

A. Yes, sir, several.

Q. What amount?

A. About $75,000.

The COURT: When you spoke of $25,900 is that the amount of assets collected in cash?

A. Yes, sir.

Q. He said the assets were $26,000?

A. Yes, sir.

Mr. BURKE: Now I want to show the bad and uncollectible accounts.

The COURT: I don't suppose they will object to that. You can go into that.

348 Mr. BROWN: No.

A. $75,888.

Mr. BURKE: Bad and uncollectible debts?

A. Yes, sir.

Q. Give the names of the parties and the amounts.

The COURT: Is that material?

Mr. BURKE: We want to show by the ledger and trace it right through.

A. This is the list of them which is here, marked Exhibit A.

Mr. BROWN: He wants to prove there were assets, and then he is going to show that we couldn't collect them.

The COURT: Do you object?

Mr. BROWN: No, I do not object.

A. This is a list of them, Schedule A here?

Mr. BURKE: Read that, the names and the amounts.

The COURT: Put it in evidence. That is the quickest way.

Mr. BURKE: The names and amounts.

A. J. T. Kilgore, $836.73; Dick Brothers & Company $217.20.

Mr. BROWN: Is that uncollectible?

A. It was uncollectible not because of the insolvency of the parties or inability to pay, but because they disputed the amount, and these were accounts appearing upon the face of the books of Crawford & Valentine. W. F. Leland, $1200; O. C. Eager, $960.77; B. F. Kendall, $711.50; I. Hodson, $45,430.63; James T. Watkins, $3809.75; Frank Lynch——

The COURT: Is that Joseph R. Wilkins?

349 A. Yes, sir. That is Joseph R. Wilkins. The account on its face stood Watkins.

Mr. BROWN: When did it stand so?

Mr. PENCE: Let him finish first.

A. Frank Lynch, $9,016.39; Hodson & Salisbury, $2550.95; Wilkins & Hodson $674; P. E. Stanley, $5,135; E. S. Mills, $623; James J. Johnson $150; B. F. Haddock, $1108; C. P. McAvoy, $2537.88; S. B. Barker $530.64; E. Cook, $54.82; Marshall Babcock $7.50; E. B. Martin $225.57.

Mr. BURKE: What was finally done by the receiver with the bad and uncollectible accounts?

A. Sold under an order of court.

Q. Were they advertised?

A. Advertised as provided by the order of court and put in the papers and sold.

Q. For what were they sold?

A. $100 cash. They were advertised and sold for $100 cash.

The COURT: All these accounts?

A. Yes, sir.

Mr. BURKE: Who rendered the bills for the legal services performed for the receiver and by whom were the said bills paid?

A. Flower, Smith & Musgrave, I think, were the attorneys.

Q. I wish you would step here and look at the account of John E. Burke and state how that account was closed by the receiver?

A. I ordered the price at the close of business on the day of the failure——

350 Q. Price of what?

A. The price of stock, bonds, to be taken as the price at which the items should be entered in the separate accounts, and the books closed.

Q. Take this account.

A. That was closed in that way. I ordered the entry to be made in red ink. The account of John E. Burke.

The COURT: You credited Mr. Burke's account with the value of that sort of stock at the close of business that day?

A. Yes, sir, merely for the purpose of getting at a balance.

Mr. BURKE: There was no sale of the stock?

A. No, sir, there was no sale of the stock.

Mr. PENCE: Didn't have any on hand?

A. No, sir.

Q. None turned over?

A. No.

Cross examination.

By Mr. BROWN:

Q. In the red ink here, James R. Watkins, it stood in the ledger in the name of James R. Watkins. When did it first stand in the ledger in the name of James R. Watkins?

A. Mr. Brown, I wouldn't say that. The first time I ever saw the account it was in the name of James R. Watkins.

Q. When was that?

A. Three or four days after the failure, but it had been badly erased as you can see at the time, and whether it was done
351 after the books came into my hands by Mr. Kilgore or by Mr. Campbell, or whether it had been done before that I cannot say.

Q. But it was evidently an account which stood Joseph R. Wilkins?

A. Oh, yes. We had interviews with Mr. Wilkins about it.

Q. Mr. Wilkins admitted it was his account?

A. He never did to me, Mr. Brown. I think he did, but he never did to me.

Q. He was the caller on the stock exchange of Chicago?

A. Yes, sir.

Q. It was against the rules of the stock exchange that he should trade?

A. I am not familiar with the rules of the stock exchange. I was not a member of it.

Q. Well, it was?

A. I have understood so. It is outside of my knowledge.

Q. Did you find in the books which came into your hands an account of the wheat deal which Mr. Crawford, of Crawford & Valentine, was in shortly before the failure?

A. I think so. I closed up some transactions with Baldwin & Farnum, I think, but I don't recall the details of them at all at the present time.

Q. Do you remember they were shortly before the failure?

A. Yes, sir, and some existing at the time of the failure. Some existed at the time of the failure.

Q. And that you remember also that those deals showed a very considerable loss, thirty or forty thousand dollars?

352 A. I could not state that. I think there was a loss, but I couldn't state it.

Q. Don't you know it was a very large loss compared to the whole amount of liabilities here, assets and so on?

A. In a general way I do, yes, but I don't know the details about it.

Recess to 2 o'clock p. m.

Court re-assembled at 2 o'clock p. m.

ERNEST RICKETT, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Burke and testified as follows:

Q. What is your name?
A. Ernest Rickett.
Q. Where do you reside?
A. In Chicago.
Q. How long have you resided in the city?
A. Almost ten years.
Q. Are you connected with any firm?
A. I am.
Q. With what firm?
A. I am a member of the firm of Smith, Rickett, Clarke & Company.
Q. What was your business?
A. Certified public accountant.
353 Q. What is the business of your firm?
A. Certified public accountants.
The COURT: What do you mean by certified public accountants?
A. The term certified public accountant means that we have passed all necessary examinations made by the State of New York for that profession.
Mr. PENCE: In other words, you are a professional accountant?
The COURT: He says they are certified. I wanted to know what he meant by certified. It appears they have some law for accountants in New York?
A. Yes, sir.
Mr. BURKE: That means expert accountants?
A. Yes, sir.
The COURT: Qualified in the State of New York?
A. Yes, sir.
Mr. BURKE: Have you a diploma to that effect?
A. Yes, sir.
Q. How long have you had that?
A. I think the law was passed four years ago, and I have had the diploma ever since the law was passed.
Q. Have you been engaged in that business continually for several years past?
A. For almost ten years I have been.
Q. Have you examined the account books of Crawford & Valentine with a view to ascertain their financial condition on the 31st day of December, 1894?
A. I have.

Mr. BROWN: I object. That is preliminary, but I don't
354 think it is competent evidence. I object to the materiality of the evidence and the competency of this witness. We have no opportunity to know on what basis he proceeded.
The COURT: You will have an opportunity on cross-examination.

This brings it down to within a few days of the time when they claim there was a fraudulent disposition of the stock.

Mr. BROWN: It does not prove knowledge on the part of the defendants even if they were insolvent as shown by the evidence. Therefore I think it is immaterial.

Mr. PENCE: He is presumed to be aware of the contents of his own books.

The COURT: The objection goes to the weight of the evidence rather than its admissibility. Let him answer.

To which ruling of the court the defendants, and each of them, by their counsel, then and there duly excepted.

Mr. BURKE: What is your answer? You say you have?

A. Yes, sir.

Q. With what result? What was their financial condition on the 31st day of December, 1894?

A. They were insolvent. Their liabilities exceeded their assets by $37,342.60.

355 Cross-examination.

By Mr. BROWN:

Q. Who asked you to make an examination of these books?

A. Mr. Burke.

Q. When?

A. Last July.

Q. You made it then?

A. I made part of it then and part in September.

Q. How long did it take you to make this examination?

A. I could not state exactly without reference to my books, but I think it took me in the neighborhood of four to six days including preparation of statement.

Q. You have had no communications concerning the examination of these books with the defendants Messrs. Crawford & Valentine, have you?

A. I don't quite catch your question.

Q. You have had no communication with Crawford and Valentine, or either of them, concerning this examination which you made?

A. No.

Q. Who gave you the books?

A. Mr. Burke.

Q. You didn't communicate with them or with their counsel in any way, did you, in connection with the examination?

A. No.

Q. What did Mr. Burke ask you to do when he asked you to examine their books?

A. He asked me to examine their books with a view of finding out the solvency, or otherwise, of the firm on the close of
356 business on the 31st of December, 1894.

Q. Did you examine the books as to any other date?
A. Not with that object entirely, no.
Q. So the result of your examination is confined entirely to that date?
A. The result I gave you is confined to that date with the exception of following up certain accounts to see what became of them later on.
Q. You reckoned in all the assets, did you, in this examination?
A. All the good assets.
Q. What do you mean by good assets?
A. All collectible accounts.
Q. What do you mean by all collectible accounts? Did you leave out all accounts which were afterwards reported to be uncollectible?
A. I did.
Q. You left out this entire list of accounts which Mr. Niblack mentioned this morning as being sold for $100?
A. I did not hear the testimony this morning.
Q. What do you mean by saying that you left out the uncollectible accounts? What uncollectible accounts did you leave out?
A. I left out all accounts which were not realizable upon when the firm made an assignment.
Q. You mean you left out all the accounts which upon the 21st of May, or which came into the hands of the receiver and which were not collectible; is that so?
A. That is right.

Mr. BROWN: I move to strike out his testimony, your
357 honor. I don't know what evidence there is concerning the work.

The COURT: Let it stand for what it is worth. He has simply stricken out everything that the receiver did not collect, and called it bad.

To which ruling of the court the defendants, and each of them, by their counsel then and there duly excepted.

Mr. BROWN: What knowledge had you that those accounts were bad?
A. I had the book accounts which showed that those accounts had not been realized upon, and I also had before me the receiver's report.
The COURT: Do you know what these accounts were worth at the time you struck the balance? That is, December 31st? Did you make any inquiry whether they were worth anything at that time or not?
A. From the books of account it appeared that they were not worth anything.
Q. That fact appears from the fact they were not collected?
A. No, there were no securities, no collaterals against the accounts I considered bad.

Q. You don't know whether the parties were good or bad on that day?

A. No.

Mr. BROWN: How did you get at the value of the assets which you regarded as good?

A. Because I found that they were realized upon.

Q. What did you put them in at, the price they were realized
358 upon in May or afterwards?

A. I put them in at their book value the 31st of December, 1894.

Q. How did you find their book value on the 31st of December?

A. I found the value of the stock at that date.

Q. How?

A. By reference to the standard publications.

Q. What were they?

A. They were the Economist as far as Chicago stocks were concerned, and I think the New York Financial Times or Financial Chronicle, I am not sure which it was, of New York.

Q. Did you find them all?

A. I found them all with one exception.

Q. What was that?

A. That was a security called the Paige Iron Works.

Mr. BURKE: Car Company?

A. Or Paige Car Company, something like that.

Mr. BROWN: How did you determine the value of that?

A. I put it in at 15 cents on both sides of the ledger and it did not affect the result whatever.

The COURT: It did not affect the result whatever price you put it in at?

A. No.

Q. Would it?

A. No. I might call it 200 or anything; simply to get a figure to go by I put it in at 50 cents.

Mr. BROWN: Do you know among the assets there was a seat certificate in the New York stock exchange?

A. What is the question?

359 Q. Do you know that among the assets there was a seat in the New York stock exchange, a membership?

A. I did.

Q. What did you put that in at?

A. $19,500.

Q. How did you arrive at that figure?

A. By reference to the New York Financial Times or Chronicle.

Q. Did you find a quotation of memberships in the New York stock exchange on the 31st of December, 1894?

A. Not exactly that date, but I found quotations before and after.

Q. Sales afterwards made of memberships?

A. Reported sales.

Q. How long before and how long after?

A. I couldn't tell you without reference, but I think about a year to half a year each way.

Q. I suppose you are aware that a membership in the New York stock exchange now sells for something like $55,000 don't you?

A. No, I am not aware of that fact.

Q. Are you aware that it is not the fact?

Mr. PENCE: That is not material what they may be worth five years after the transaction.

Mr. BROWN: Do you know what they are worth now, what they have sold for lately?

A. No.

Q. Do you know what they sold for in June and July, '94?

A. I believe that in June, 1894, the latest quotation was $19,500.

360 Q. Do you know that? Do you remember that fact, that that was the quotation in June, 1894?

A. Yes, sir.

Cross-examination.

By Mr. VROOMAN:

Q. Did you find any wheat transaction at that time?

A. Yes, sir.

Q. How did you arrive at the value of those transactions?

A. The account which showed those wheat transactions just showed the profit or the loss on each transaction. The balance of the account represented, I believe, the loss on the transactions up to that date.

Q. Did you find anything in the account to show what was being carried at that time in the way of wheat?

A. No.

Q. Will the books show that?

A. No, not on their face.

Q. There might be a large amount of wheat, oats or corn carried at that time, and the books wouldn't show it.

Mr. BURKE: He is testifying what the books show.

The COURT: He is asking if the books show what amount of wheat or stock had been carried at that time. Do they?

A. No, the books don't show.

Q. Does it show at any time what wheat had been carried?

A. Books of account which I saw do not contain any entry.

Mr. VROOMAN: You found wheat transactions of a date
361 prior to that time and subsequent to that time?

A. No.

Q. But you found nothing in the books to show what was carried at the different times?

A. No.

Q. Simply the profits and losses?

A. Yes, sir.

Q. So you are unable to determine what amount of wheat there was on hand at that time?

A. No, sir.

Q. Nor what profits there might be in them or losses on wheat deals that were in their hands at that time from the books?

A. No

Q. Did you examine the accounts of Crawford & Valentine with the firm?

A. Only in so far as to show what balances there were in those accounts on the 31st of December.

Q. You found that both members owed the firm, did you?

A. Yes, sir.

Q. Did you examine into the responsibility of the members of the firm at that time?

A. No.

Q. Or whether they were solvent at that time?

A. No.

Q. Do you know anything about any assets of theirs at that time, or did you make any inquiry as to them?

A. No, I made no inquiry as to their personal responsibility.

Q. Did you examine the bond account?

A. Yes, sir.

Q. In the same manner that you did the stocks?

A. They carried a stock and bond account on their books.

Q. Did you figure out the value of the bonds the same as you did the stocks?

A. I did.

362 Q. On the same basis?

A. The same basis.

Q. From the same source?

A. The same source.

Mr. BURKE: You stated, Mr. Rickett, that you examined the individual account of Crawford & Valentine on the books? That is correct.

A. I did.

Q. And you ascertained what each of them owed to the firm on the 31st day of December, 1894?

A. Yes, sir.

Q. Can you state the total amount that they owed the firm on December 31st, 1894?

A. I could by reference to my report which you have in your hand. R. C. Crawford, on his local account, owed the firm $9,189.36. No, on that account he owed $9,438.48. On another account, which he called his No. 2 account, he owed $707.82. In the account termed Milstead & Crawford, in which he had an interest, Milstead and Crawford owed the firm $118.75. In another form under the name of Stanley & Crawford, Stanley & Crawford owed the firm $323.84. Mr. Valentine owes the firm $4,572.18; and also in another account which he terms his No. 2 account, he owes the firm $2,327.32.

Q. What was the total amount owed to the firm by the defendants Crawford and Valentine?

A. I will have to deduct one or two accounts.

Q. What was the amount of their withdrawals?

The COURT: Somewhere about $40,000, wasn't it?

A. No, it is in the neighborhood of $30,612.

363 Q. One item of nine?

A. No, two of nine.

Q. What is the third?

A. $4500, and two of over $2,000, including one or two losses on speculations which they made, and their withdrawals, the total amount is $30,612.02.

Mr. BURKE: At what date?

A. At the close of business, the 31st of December, 1894.

The COURT: That is about two weeks before the sale of the first traction stock?

Mr. BURKE: No, sir. The first sale of traction stock is on October 24th, 1894. The next sale is on January 10th.

The COURT: You were carrying 500 shares of that stock down to December 31st.

Mr. BURKE: Not for me.

The COURT: Well, for somebody, 500 shares.

Mr. BURKE: They had 500 shares on the 31st of December, 1894, but 100 shares purchased by themselves. They sold 100 shares on October 24th. On October 24th, 1894, they had 500 shares on hand belonging to me.

Mr. BROWN: On the order of Mr. Burke bought on the 29th.

Mr. BURKE: And on the 24th they sold 100.

The COURT: The evidence shows that none of these certificates were tagged with your name or anybody else's name, but the evidence introduced by yourself is here that they had on January 1st, 450, July 1st, 450, November 30th 50, and December 31st 500.

364 Mr. BURKE: Yes, they had 500 on the 31st of December, but I am tracing the stock which belonged to me. On the 24th of October they had 500 shares belonging to me, but on that day they sold out of that 500 shares, they sold 100. Consequently, at the close of business on October 24th of the Metropolitan Traction stock they had 400 and then on the 29th they bought 100, not on my order, their own.

Mr. BROWN: They sold for Wilkins on October 24th and bought on October 29th.

The COURT: You can argue it when they get through.

Mr. BURKE: That sale or purchase I had nothing to do with whatever.

Q. Have you got a list of the debts that existed on the first day of January, 1894?

A. I have.

Q. Will you state them? I mean the 31st of December, 1894?

A. Do you want them in detail?

Q. Yes, sir.

A. J. J. Kilgore $836.73; J. Hodson, Jr. on No. 1 account $37,648.15; Joseph R. Wilkins, $3,736.42; Frank C. Lynch, $9,637.73; Hodson & Salsbury $1,335.09; J. Hodson Jr., on No. 2 account, $691.84; Wilkins, Hodson & Co. pool account $674.93; J. Hodson Jr., on No. 3 account——

Q. That is I. Hodson?

A. $5,308.11; I. Hodson, Jr., on special account $2,159.52; P. E. Stanley $6,635.18; C. A. Eastman $588.66; E. S. Mears,
365 $608.82; W. T. Leeland, $1200; Emma Green, trading through S. V. Barker—excuse me, S. V. Barker trading through Emma Green, $532.04; James J. Townsend $169.61.

Q. These are the accounts which you estimated as bad and uncollectable accounts in making up your statement?

A. Yes, sir.

The COURT: Why was the Townsend account called bad, do you know?

A. The books do not show it was ever collected.

Q. Is he not a man prominent on the board?

A. I presume it is a disputed account.

Mr. VROOMAN: Wait, do you know anything about it?

A. I know it was never collected.

Q. That is all you know about these, that they were not collected?

The COURT: He has substantially stated that, that he did not make any investigation but simply found that they were not collected.

Mr. BURKE: Then he also stated it was what he knows from the report of the receiver.

The COURT: He says that the receiver reported that he had not collected it.

Mr. VROOMAN: This list you have just made out is the list you made from the receiver's report?

A. No, sir, it is made from the books.

366 Q. And compared with the receiver's report?

A. Yes, sir.

Q. The receiver's report contains these same names?

A. No, not all, not quite all.

Q. You have added somthing?

A. For instance, the receiver's report does not show C. A. Eastman, because the firm of Crawford & Valentine, themselves, wrote that off as a bad account very shortly after January first.

Q. How much is that account?

A. $588.66.

Q. It is substantially the same list?

A. It is substantially the same list, yes, sir.

Q. Items outside of that list are no large amount, small trifling amounts?

A. Yes, sir.

Mr. BROWN: I presume in the examination of the witness I may see and use that list?

Mr. BURKE: When you say you didn't take into account the bad or uncollectable debts, state just what you meant by not taking them into account? You did take them into account, didn't you?

A. I took them into account in this manner, that I charged them against the profits, but I did not include them as assets on the 31st of December.

Q. But you did take them into account in making up this statement?

A. I did, yes, sir.

Mr. BROWN: You simply mean by saying that you didn't take them into account, you mean this, don't you, that if those
367 bad debts, as you call them—that list which you read—had been included in the assets, the assets would have been just so much greater than what you reported?

A. Yes.

Q. And the aggregate of them is how much?

The COURT: The aggregate of the bad accounts?

A. The aggregate of those accounts designated by me as bad is $67,753.51.

Mr. BROWN: Eliminating those altogether from the assets you say the books show the liabilities exceeded the assets in the amount of $37,000, was it?

A. $37,342.60.

Q. Counting them at their face, the assets would have exceeded the liabilities at some $30,000?

A. Yes.

Q. And did you not take into account anything that was not show- on the books? of Crawford & Valentine in regard to any possible responsibility, or assets of Valentine & Crawford not shown as assets of the firm of Crawford & Valentine, did you?

A. Well, to this extent that the transactions after the date that I made this investigation do not show that they made any large amount of money in any speculations.

Q. No, I do not mean that, but the books show the fact that Mr. Valentine owed the firm, according to the bookkeeping entries a certain sum?

A. Yes, sir.

368 Q. Had they been possessed of individual assels those accounts would have been considered good, would they not?

Objected to by counsel for plaintiff.

Q. You didn't take into account any personal responsibility of Valentine and Crawford?

Mr. PENCE: He could not. It was not his business.

The COURT: Were the liabilities of the individual members of the firm to the firm included in those assets?

Mr. BURKE: Not in the bad and uncollectable accounts.

The COURT: Are they included in the bad accounts you eliminated?

A. They are not included in the bad accounts, but they are not included anywhere.

Mr. BROWN: They are neither put in the good or bad assets in your figures?

A. No.

The COURT: When these accounts, that you call bad, and therefore disregarded or discarded, when they became bad, you don't know? Do you know, in other words, when the financial responsibility of these men became worthless?

Mr. BURKE: I suppose he knows on the first of January they were there.

The COURT: I am asking when they became bad.

Mr. BURKE: They never were collected.

The COURT: There was a time when they were considered good, or they wouldn't have been given credit. Do you know when they became bad?

A. No, not definitely.

369 Q. You do not know, except from the fact that they were not afterwards collected?

A. I think any business man would have looked upon them as very doubtful at the date I made this examination.

Q. Or why should you consider them on December 31st good?

A. Because I think if they were good they would have put up collaterals to protect the accounts.

Q. Simply because there was no collateral you regarded them as bad?

Mr. MORAN: No collateral and they were never paid.

A. Afterwards they were not paid.

Mr. VROOMAN: You mean the books show that they were not paid?

A. The books show.

Q. Just answer the question. The books show that they were not paid?

A. Yes, sir, the books show that they were not paid.

Mr. BURKE: And the receiver's report shows they were not paid?

A. Yes, sir.

Q. And they were sold for $100?

A. Yes, sir.

Mr. VROOMAN: You don't know how much of that has been collected since that time?

A. Not since they were sold by the receiver, no.

Q. You don't know but they have been all collected, and if they had been collected the credits would not appear on the books necessarily here after they had been sold, would they?

370 A. Not after they had been sold, no.

Q. These stocks fluctuate, don't they from day to day in value: some days they are less and on other days considerable more?

A. Yes, sir.

Q. And in a large amount of stocks and bonds that fluctuate in

that way a small difference in the prices would make considerable difference in the amount of the assets, wouldn't it?

Objected to by counsel for plaintiff; objection sustained; to which ruling of the court, defendants, by their counsel then and there duly excepted.

Mr. BROWN: Do you know anything about the reasonable expectations of either Messrs. Crawford or Valentine during the time that the- were continuing in business of securing help from immediate family connections and friends?

A. Only by hearsay.

Q. The responsibility of their parents, or anything of that sort?

A. Only by hearsay.

Mr. PENCE: I offer in evidence the deposition of William Kent.

Said deposition is as follows:

371 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN E. BURKE, Plaintiff,
vs.
RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Defendants. } 173,384, 7704.

The deposition of William Kent, of the county of Cook and State of Illinois, a witness of lawful age produced, sworn, and examined under oath, on the 18th day of May, A. D. 1900, at the office of Flower, Vroman & Musgrave, room 403, 164 Dearborn street, in the city of Chicago, in the county of Cook and State of Illinois, before me, Stella W. Tenney, a notary public in and for said Cook county, Illinois, pursuant to the annexed stipulation, to be used as evidence on the trial of the above entitled cause on behalf of said plaintiff, said deposition being taken on oral interrogatories then and there propounded to said witness.

Present: E. O. Brown, Esq., and C. E. Vroman, Esq., appearing on behalf of said defendants; the plaintiff appearing in his own behalf.

The said WILLIAM KENT being first duly sworn by me as a witness to the said cause, previous to the commencement of his examination, to testify the truth as well on the plaintiff's behalf, as on behalf of said defendants, so far as he should be interrogated testified and deposed as follows:

Direct examination by Mr. BURKE:

Q. 1. What is your full name?

A. William Kent.

372 Q. 2. Where do you reside?

A. 5112 Kimbark avenue, Chicago.

Q. 3. How long have you resided in this city?

A. I was born in Chicago, but was not a resident of the city from 1871 to 1887, and have resided here since then.

Q. 4. Are you personally acquainted with Richard C. Crawford and Edward A. Valentine, defendants in this suit?

A. I am.

Q. 5. How long have you known them?

A. I have known Valentine since about 1888. I have known Crawford slightly since about 1894,—1893 or 1894.

Q. 6. Are you acquainted with John E. Burke, plaintiff in this suit, and how long have you known him?

A. I have been acquainted with John E. Burke since 1887.

Q. 7. In the latter part of 1894, and the early part of 1895, in what business were defendants engaged, under what name, and where was the business carried on?

A. The firm was Crawford & Valentine. They were engaged as stock brokers, I believe, with the style of bankers and brokers. Their office was in the Stock Exchange building in the south half of the La Salle Street side; I can't remember the number exactly.

Q. 8. Where, in this city?

A. In Chicago, yes.

Q. 9. On what floor?

A. Ground floor.

Q. 10. State whether on April 1, 1895, you paid to the defendants, Crawford & Valentine, any money for John E. Burke, the plaintiff, and at his request?

A. Yes, I did.

Q. 11. How much money did you then pay the defendants, and at what place was the money paid?

A. I carried a check to the office of Crawford & Valentine and the check amounted to $3300.

Q. 12. The question is, Mr. Kent, how much money did you pay the defendants, and at what place was the money paid.

A. I didn't hand any currency to the people; I gave them my check.

373 Q. 13. You gave them your check?

A. For $3300, at their office.

Q. 14. The $3300 was paid in check and not by currency?

A. It was.

Q. 15. For what purpose was the $3300 paid?

A. $3300 was paid as margin on the account of John E. Burke for Metropolitan Traction stock.

Q. 16. On how many shares of Metropolitan Traction stock?

A. 550 shares.

Q. 17. On April 1, 1895, and before you gave the defendants your check for $3300 as margins on 550 shares of Metropolitan Traction stock, did you have any conversation with Valentine, one of the defendants, with reference to the number of shares of Metropolitan

Traction stock which Crawford & Valentine then had on hand, or were then holding and carrying for John E. Burke, the plaintiff?

Mr. BROWN: Objected to as leading and otherwise objectionable in form; assuming what has not been proven.

Q. 18. I will modify the question. On April 1, 1895, and before you gave the defendants your check for $3300 as margin on 550 shares of Metropolitan Traction stock, did you have any conversation with Valentine, one of the defendants, with reference to said share of stock?

A. I did.

Q. 19. State where that conversation was had, and what was said, or the substance of what was said, on the subject to which I have referred.

A. The conversation was held on the floor of the stock exchange where I had gone to see Valentine, whom I knew better than Crawford, and the conversation was that I was willing to put up a certain amount of margin to keep John E. Burke's Metropolitan Traction stock from being sold. It was at that time my understanding that John E. Burke held 500 shares——

Mr. BROWN: Counsel for defendant Crawford desires to object to the witness stating his understanding, and insists that the answer to this question should give only the conversation between
374 him and Mr. Valentine as nearly as he can recollect it, or the substance of it, but not the understanding of the witness.

Q. 20. Finish your answer, Mr. Kent.

A. Mr. Valentine informed me that John E. Burke at that time held 550 shares of the stock of the Metropolitan Traction Company, with his firm. I have a distinct recollection of the amount because it was 50 shares more than I had been informed was held by Mr. Burke at the last time I had had conversation with him on the subject.

Q. 21. In the conversation to which you have just referred, what if anything was said between yourself and Mr. Valentine, with reference to the amount of margins that was required on the 550 shares of Metropolitan Traction stock?

Mr. BROWN: Objected to as leading.

Q. 22. I will modify the question by asking you if in the conversation to which you have just referred as having had with Valentine, was anything said in regard to the amount of money that would have to be put up as margins on the 550 shares of Metropolitan Traction stock?

Mr. BROWN: Objected to as leading.

A. The conversation was to the effect that Crawford & Valentine would insist on 10 points margin on that 550 shares of stock.

Q. 23. On April 1st, 1895, and after your conversation with Val-

entine on the floor of the stock exchange, and before you gave the defendants your check for $3300, did you have any conversation with the defendant Crawford, and with one J. T. Kilgour, with reference to the number of shares of the Metropolitan Traction stock which Crawford & Valentine then had?

A. I had a conversation with Crawford and the man who managed his office, but as to the name of that man I could not swear.

375 Q. 24. State where that conversation was had, and what was said and done, or the substance of what was said, with reference to margin on Metropolitan Traction stock referred to in your previous answers.

A. The same question of the amount of stock came up, and the same question of margin came up—10 point margin; and we then and there figured together on the amount that I should have to put up in order to make the margin good, and that amount was found to be $3300, for which I then and there wrote out my check and handed it in to the firm.

Q. 25. Prior to your giving your check for $3300, state fully the substance of the conversation that was had that morning in the office of Crawford & Valentine between yourself and Mr. *Mr.* Crawford and J. T. Kilgore, with reference to the number of shares of Metropolitan Traction stock that was required to be margined, and the amount of the margin. Please relate the conversation as fully as you can, or give the substance of it?

A. In substance the conversation was based upon the question of how much margin would be necessary to protect the stock, and I was informed by Mr. Crawford that it would have to be kept at 10 points above the market——

Q. 26. That it would have to be kept at 10 points above the market, or that a 10 point margin should then be required on it?

Mr. BROWN: Counsel for defendant objects to the question as leading, and as interrupting the witness and putting words in his mouth.

A. What I meant was that there should be 10 points margin kept to it. That was what I was trying to get at.

Q. 27. Finish your answer, please.

A. I at that time asked Mr. Crawford if they were not calling Mr. Burke pretty hard for margins, and he informed me that it was necessary as they were having sharp calls for their margins from the people who were carrying the stock for them. Thereupon I wrote a request that whenever 10 points of margin should be secured without the use of my money, that I should be en-

376 titled to call for the difference between the 10 points margin and the market, so as to be able to take my money down.

Q. 28. In the conversation to which you have just referred, state whether or not anything was said with reference to any amount of money that John E. Burke might have to put up as margins in addition to your $3300, and if so, state what that was?

Mr. BROWN: Objected to as leading, and the whole line of examination is objected to as persistently leading; and I give notice that we shall insist upon it at the hearing.

A. It is my recollection that John E. Burke was called upon at the same time to put up the money, but I have no specific recollection of the amount of money that was put up at that time by John E. Burke.

Q. 29. How was the amount of margins to be put up then arrived at, and what was done if anything for the purpose of ascertaining how much margins should be put up?

A. My recollection is that a calculation was made as to how much of an amount was needed to margin 550 shares of the stock 10 points, and the difference between the margins put up by John E. Burke; and what was necessary to make that margin, my recollection is, $3300, which I put up.

Q. 30. Was any figuring done?

A. Yes.

Q. 31. Who did the figuring?

A. I know I figured, and it is my recollection that the other people figured.

Q. 32. State whether, within a few weeks prior to April 1, 1895, you made an effort on behalf of the plaintiff to find some bank or some party in Chicago that would be willing to advance to the defendants the money due them on the Metropolitan Traction stock in controversy in this cause?

Mr. BROWN: Objected to as immaterial, incompetent and leading.

A. I did. I went, amongst others, to the firm of Walker &
377 Wrenn and asked them whether they could not manage to get a loan on this stock so that the stock would be carried for a long period,—an out and out loan.

Mr. BROWN: Answer objected to as immaterial and incompetent, and motion made to strike it out.

Q. 33. State whether on May 20, 1895, you went with the plaintiff to the office of the defendant at 220 La Salle street, and then and there on behalf of the plaintiff demanded of Mr. Boyd, who represented the Chicago Title & Trust Company, receiver, the delivery of 550 shares of Metropolitan Traction stock, and then and there offered to pay him the amount due from the plaintiff to the defendants on said stock.

Mr. BROWN: Objected to as incompetent, immaterial and leading, and the objection to the form of the question will be insisted on at the hearing.

A. I can swear to everything except the exact date. Leaving out the question of the exact date I should state that I went immediately subsequent to the failure of Crawford and Valentine to their

office, with John E. Burke, and made a demand for that stock, being prepared at that time to take it up and pay for it.

Mr. BROWN: Answer objected to and motion made to strike it out.

Q. 34. On whose behalf did you go to the defendants' office and make this demand and offer?

A. On behalf of John E. Burke.

Q. 35. Was this demand and offer made on the day of the defendants' failure?

A. It is my recollection that it was the day following the failure, but I couldn't swear to the date. It was immediately subsequent to the failure.

Cross-examination by Mr. BROWN:

Q. 1. Mr. Kent, this $3300., of which you have spoken, was repaid to you afterwards, with interest, was it not?

A. It was.

Q. 2. By Crawford & Valentine?

A. By Crawford & Valentine.

378 Q. 3. When?

A. I consulted my books this morning and found the entry on May 13th.

Q. 4. Then if you testified that it was April 23rd in the previous trial of this cause, that was a mistake?

A. Yes.

Q. 5. Now, this conversation that you had upon the floor of the stock exchange with Mr. Valentine,—I would like, if you can, that you should give it a little more in direct language. Do you remember whether you spoke to Mr. Valentine, or he to you, about this business, upon that occasion?

A. I went there to find him, and it is natural I spoke to him first.

Q. 6. What, as nearly as you can remember, did you say to him, exactly?

A. I said in substance that I wished to protect the Metropolitan Traction stock which Mr. Burke was carrying with his firm.

Q. 7. Then what did he say? Did he mention the number of shares to you, or did you speak of them to him first?

A. It is my recollection that I mentioned the number of shares first, as a means of getting at what he would require as margins; and it is my recollection that I mentioned the number of 500 shares and that he then and there informed me that the number of shares was 550.

Q. 8. That was more than you had supposed Mr. Burke was carrying?

A. Yes.

Q. 9. And now what did you say when you found that out? Did

you say something about that being more than you had supposed or expected?

A. I did.

Q. 10. What did you say?

A. I can't remember the exact language used but I have a distinct recollection that I evinced some surprise and displeasure at the amount being more than I supposed.

Mr. BURKE: I object to the answer of the witness and move that it be stricken out as incompetent, irrelevant, immaterial and not cross-examination.

379 Q. 11. I should like the whole conversation, Mr. Kent, as nearly as you can give it. Give everything,—all that you can remember.

Mr. BURKE: I object to the question for the reason that it is not confined to the matter drawn out in direct examination.

A. I can only give the substance of the conversation; it was had a good many years ago.

Q. 12. Well, give the substance of the entire conversation held at that time, not any particular part of it, but all that you can remember of that conversation.

Mr. BURKE: Question objected to because it is not confined to the matter in controversy, and because, further, it is not confined to the matter brought out in direct examination. The witness might have, in the conversation,—there might have been a great many other matters talked about, referred to and discussed, that have no bearing whatever upon the questions in controversy in this case.

A. I have no distinct recollection of that conversation, excepting such portion as concerned me in putting up a margin on the stock. I found at that time, as I said, that there was more of that stock than I had supposed. I remember distinctly that I was displeased at finding there was more stock to be protected that I had gone with the idea of protecting. Further than that I do not recollect the conversation.

Q. 13. Did you express that displeasure?

A. It is my recollection that I did.

Q. 14. Did you say that Mr. Burke had been speculating heavier than he had any right to?

Mr. BURKE: Objected to as incompetent, irrelevant, immaterial, and not cross-examination.

A. I cannot recollect specifically remarks of that sort, but I do recollect, as I said, the displeasure at finding that there was
380 more stock to be margined than I had expected to margin.

Q. 15. Did you say that this was the last time that you were going to help Mr. Burke out?

Mr. BURKE: Objected to as incompetent, irrelevant and immaterial, and not cross-examination.

A. I have no distinct recollection of such remark.

Q. 16. Have you not already testified upon a former occasion that you did say that?

A. That was some years back. Does a person's memory remain the same?

Q. 17. *Q. 17.* Wasn't it better the nearer it was to the time of the transaction? Wasn't your recollection of what took place in April, 1895, better in March, 1897, than it is at present?

A. It might be.

Q. 18. Then if in March, 1897, you remembered that you did say to Mr. Valentine that that would be the last time that you would help Burke out, it was probably correct, was it not?

Mr. BURKE: Objected to as incompetent, irrelevant, immaterial and not cross-examination.

A. I should not have perjured myself on the former occasion.

Q. 19. How did you come to go to see Crawford & Valentine? At whose solicitation did you go?

A. I cannot say with clear recollection that I was solicited to see Crawford & Valentine. I was solicited to help Mr. Burke and I went to see Crawford & Valentine in the line of that solicitation.

Q. 20. Solicited by Mr. Burke?

A. Yes.

Q. 21. When you went up stairs, or down stairs, wherever it was to the office of Crawford & Valentine, and saw Mr. Crawford and the general manager of the defendants, as you say, will you please state again what the exact conversation was there as nearly as you can recollect—the whole of it?

A. The substance of it was as to how much margin it was necessary for me to put up to make the 10 points good.

381 Q. 22. Was there a conversation at that time about your getting back whatever you might put up if the stock went up 10 points?

A. Yes.

Q. 23. What was that?

A. There was not only a conversation to that effect, but I believe I made a writing to that effect. I don't recollect whether they accepted it or not, or exactly what form it took, but there was certainly a memorandum to that effect. This is correct. (Referring to the paper handed to witness by counsel for defendants) I wrote out this memorandum and it was signed by John E. Burke,—authorizing them to pay me back when the margin was secured for 10 points.

Q. 24. You mean that the paper which you have in your hand, to the best of your recollection, is a correct copy of the manuscript in your hand-writing, signed by John E. Burke, to which you have just referred?

A. Yes.

Q. 25. When did John E. Burke sign that?

A. Signed it in the office at that time when he was with me.

Q. 26. How did that come to be made? Did Mr. Valentine or

Mr. Crawford tell you you would have to have an order from Mr. Burke if the money was to be paid back to you?

A. I can't answer directly as to that, but the money advanced by me, as far as Crawford & Valentine were concerned, went directly into Burke's account, and before it could get out of Burke's account back to me there should be some notice to the effect that it should go back.

Q. 27. And wasn't the propriety of that, or the necessity of that, mentioned to you in one of these conversations, either by Mr. Valentine or Mr. Crawford?

A. I can't say as to that at all, whether it occurred to me, or occurred to them.

Q. 28. You may read the paper which you have been alluding to.

A. (Reading.)

Messrs. Crawford & Valentine:

382 Please return to William Kent, at his order, any balance that may be due on Metropolitan Traction stock held for me up to $3300, after a 10 point margin is provided for, the stock at this time being secured to 76¼.

(Signed) JOHN E. BURKE.

That it dated April 1, 1895.

Q. 29. Did you call for this $3300 and interest?

A. Yes.

Q. 30. Did you call on them at their office?

A. It is my recollection that I went to their office and got that money.

Q. 31. At this time, in this conversation, do you remember that there was anything said about any other stock that Mr. Burke was carrying with Crawford & Valentine?

A. Yes, I have a recollection that there was some Chesapeake & Ohio stock. That is the only thing that I happen to recollect; and the question came up as to margining that and I refused to margin it, whereupon Mr. Burke told them to sell it.

Cross-examination.

By Mr. VROMAN:

Q. 1. Mr. Kent, you have been asked a question by Mr. Brown with reference to what you stated when you found that Mr. Burke had been carrying more stock than you supposed. As I understand, you testified upon a former trial in this action?

A. Yes.

Q. 2. And did you make in that testimony the following answer: "I probably said I thought Mr. Burke was doing a little more business than he ought to be doing under the circumstances?"

Mr. BURKE: Objected to as incompetent, irrelevant, immaterial and not cross-examination.

A. I have an idea that I did make such a remark. I have a faint recollection that I may have said something of that sort.

Mr. BURKE: I move to have the answer stri-ken out as incompetent, irrelevant and immaterial, and not cross-examination.

Q. 3. And were you asked at that time this question, and did you give the following answer: "Q. Didn't you say in words or substance, that Burke, the old fool, is speculating heavier than he
383 has any right to? A. I presume I may have said so."

Mr. BURKE: Objected to as irrelevant, incompetent and immaterial and not cross-examination.

A. I have a recollection of having testified to that effect.

Q. 4. And again, "That this would be the last time you would help him out? A. I think that is correct."

Mr. BURKE: Same objection.

A. As to that I have no recollection. If I testified so undoubtedly I was telling the truth.

Q. 5. If you did testify to that effect at that time you said what you thought to be the truth?

A. Yes sir.

Q. 6. Did you have a notice from Crawford & Valentine to come and get the money that you afterwards got in May?

A. I have no recollection of that. I don't think I did; I can't say whether I did or did not have notice. It is my impression that I didn't have notice.

Q. 7. How did you discover that you were entitled to it?

A. By watching the market.

Q. 8. You understood that Mr. Burke had to put up margins on certain stock, didn't you?

Mr. BURKE: Objected to as asking for the understaiding of the witness.

Q. 9. From whom did you acquire that information or knowledge?

Mr. BURKE: Same objection.

A. Mr. Burke said that his stock was liable to be sold out if he didn't keep this margin good.

Q. 10. How did you understand it was liable to be sold out? Who was to sell it?

Mr. BURKE: Objected to on the ground that it is asking for the understanding of the witness, and also an opinion of the witness, and not asking for a statement of any fact, and as incompetent, irrelevant and immaterial, and not cross-examination.

A. In answer to your question I can only say that banks or
384 brokers that make collateral loans and carry stocks for people, are accustomed to insist on certain margins, and those margins failing they have the right to sell the stock out; and I understood this to be the situation in this case, that these people were carrying the stock for Mr. Burke and they demanded that a margin of 10 points should be kept up, and that the penalty for his not keeping that up would be that they would sell the stock to clean up his indebtedness to them.

Mr. BURKE: Answer objected to, and I move that it be stricken out as incompetent, irrelevant and immaterial, and giving the conclusion and opinion of the witness, and as being hearsay testimony, and as not a statement of fact.

Q. 11. Mr. Kent, do you know that at that time it was necessary to put up the margins to protect that stock, or his right to the stock—Burke's right to the stock?

Mr. BURKE: Objected to as incompetent, irrelevant and immaterial, and not cross-examination.

A. There was no question that during that time when I was endeavoring to help Mr. Burke to keep his stock, that I was conversant with the market prices of the stock from day to day. I saw the quotations and heard Mr. Burke's statement, and when I went into the office Crawford & Valentine's quotations were there and I consulted them.

Q. 12. And it was necessary to protect that stock that these margins should be put up?

Mr. BURKE: Objected to.

A. I could not state that it was necessary. It was what they demanded. The necessity of the case was another matter entirely; they did demand it.

Q. 13. Mr. Burke was not able to raise the amount at that time?

Mr. BURKE: Objected to as incompetent, irrelevant and
385 immaterial, and not cross-examination.

A. I could not state. I know that I put the money up.

Q. 14. You did it at his request?

A. Yes.

Q. 15. With the understanding from him that he was not able to do it? Is that the case?

Mr. BURKE: Objected to as incompetent, irrelevant, immaterial and not cross-examination.

A. It is.

Q. 16. Well, you understood, Mr. Kent, that when you put up this $3300 that unless it was done, any right which Mr. Burke had to any claim or interest in the stock would be wiped out?

Mr. BURKE: Objected to as incompetent, irrelevant, and immaterial, and not cross-examination; as asking for the understanding of the witness and not asking for any statement of fact.

A. It was my understanding that the firm of Crawford & Valentine demanded that this margin be kept good, and that if it were not kept good——

Q. 17. I want an answer to my question.

A. I am trying to answer your question. I am telling you what my understanding was. My understanding was that they would sell Burke's stock if his margin was not kept good.

Q. 18. (Question 16 repeated)

Mr. BURKE: Same objection.

A. I can testify that if that margin were not put up that they threatened to sell the stock.

Q. 19. You understood that if it was not put up, his interest would be wiped out?

Mr. BURKE: Same objection.

A. They would sell the stock, and if they sold the stock his interest might not be wiped out,—he might have had other margins there besides.

386 Mr. BURKE: Answer of witness objected to, and motion made to strike it out on the ground that it is not a statement of facts, but the understanding or conclusion or opinion of the witness.

Re-direct examination by Mr. BURKE:

Q. 1. Mr. Kent, have you any distinct recollection as to whether the $3323.65 was paid to you personally, or whether it was paid to Otto Langbein, an employé of yours?

A. I have no definite recollection. My memory is that I went to the office and got the check myself. I feel quite sure of that, but it is only an impression.

Q. 2. Have you any recollection of calling upon Crawford & Valentine the defendants in this case, on or about the 13th of May, with reference to their paying you this $3300, and being refused unless you obtained an order from John E. Burke, the plaintiff?

A. I have no distinct recollections to that. I can't testify as to that.

Q. 3. Have you any recollection of getting another order from John E. Burke, the plaintiff, upon the defendants for the payment of this money to you?

A. No.

Q. 4. Do you remember whether you had an order from the plaintiff in this case upon the defendants to pay you $3323.65?

A. The order that I remember called for $3300.

Q. 5. But you did receive $3323.65?

A. I did.

Q. 6. Do you recollect whether you had an order for that amount?

Mr. BROWN: Counsel objects on the ground simply that the witness has several times answered the question, and that it is manifestly improper to continue to repeat it.

A. I have no recollection about any order excepting the order calling for $3300.

Q. 7. That was the one that was left in their office on the
387 first of April 1895?

A. Yes; I distinctly remember that because I wrote it myself.

——— ———.

Subscribed and sworn to before me this 18th day of May, A. D. 1900.

——— ———,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Stella W. Tenny, a notary public of the county of Cook, in the State of Illinois, and duly appointed by the annexed stipulation to take the deposition of the said William Kent, a witness, whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said William Kent as a witness in the suit between John E. Burke, plaintiff, and Richard C. Crawford and Edward A. Valentine, defendants he was duly sworn by me as such notary public to testify the truth in relation to the matters in controversy between the said John E. Burke, plaintiff, and the said Richard C. Crawford and Edward A. Valentine, defendants, so far as he should be interrogated concerning the same; that the said deposition was taken at the office of Flower, Vroman & Musgrave, room 403, 164 Dearborn street, in the city of Chicago, in the county of Cook, and State of Illinois, on the 18th day of May, A. D. 1900, and that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto as written down were read over by the said witness, and that thereupon the same was signed and sworn to by the
388 said deponent, William Kent, before me the oath being administered by me as such notary public, at the place and on the day and year last aforesaid.

Witness my hand and notarial seal at Chicago, Cook county, Illinois, this 18th day of May, A. D. 1900.

STELLA W. TENNEY,
Notary Public.

My fee for taking the foregoing deposition is seventeen dollars ($17.00) Paid by Edward A. Valentine

STELLA W. TENNEY,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of said County.

JOHN E. BURKE, Plaintiff,
vs.
RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Defendants.
} Gen. No. 173,384, Term No. 7704.

Stipulation.

Whereas William Kent is about to leave the State of Illinois to be absent until next fall therefore it is hereby stipulated and agreed that the deposition of the said William Kent may be taken on behalf of the plaintiff in the above entitled cause by and before Stella W. Tenney, a notary public, on Monday, the 18th day of May, 1900 at 11 o'clock a. m. and on return may be read in evidence on the trial of said cause subject to such valid objections as may be made by either party to *be* interrogatories, cross-interrogatories and answers.

Dated Chicago May 16, 1900.

JOHN E. BURKE, *Plaintiff.*
PECKHAM, BROWN & PACKARD,
Att'ys for Def't Crawford.
FLOWER, VROMAN & MUSGRAVE,
Att'ys for Def't Valentine.

389 Mr. MORAN: We want to introduce the accounts of J. E. Burke.

The COURT: I think they have all practically been read into the record.

Mr. MORAN: No, they have not been read in, your honor. There have only been the results of certain things read in.

The COURT: Now, you want the whole ledger account.

Mr. BROWN: I offered Mr. Burke's account in connection with his cross examination, pages 526, and 585. It is in the record. I don't make any objection to their offering it.

The COURT: Is it admitted by you now that those pages 526 and 585 are now in the record?

Mr. BROWN: Yes.

The COURT: It is admitted, Judge Moran, that it is in the record.

Mr. BROWN: On cross examination we offered it, and they objected, and your honor said it was competent.

Mr. MORAN: The account on page 526 of the ledger, commencing September 29, 1894 from that on to the close of the account, running into page 585.

Mr. BROWN: I offer the whole of it. They begin some way down.

The COURT: If it is not already in the record it is now admitted. It is stipulated by counsel for the defendants that it is in the record.

390 Mr. BROWN: Yes, but I don't want to begin September 29th.

Mr. MORAN: We offer the account of R. C. Crawford shown on pages 201, to 212 inclusive.

The COURT: For what purpose is that offered?

Mr. MORAN: To show the character of his dealings.

The COURT: To show the character of the dealings of one of the firm.

Mr. MORAN: Yes. Now, No. 2 account, page 231 of the ledger, to 233, inclusive. We offer No. 3 account, page 234; also Crawford's New York account, on page 230 and then carried to 224 to 228 inclusive; Crawford's special account on page 229 of the ledger. It is all on that page. Now, E. A. Valentine's account, page 240 to 245 inclusive; Valentine's No. 2 account, page 250 to 252 inclusive; stocks and bonds account 410–411, 392 to 395 inclusive; Stanley & Crawford account 571 and 570; Stanley & Vallentine page 571; P. E. Stanley, 541 550 and 578; J. T. Kilgore 507, 256 and 257; Crawford & Valentine grain account 289; J. R. Wilkins 530, 476 to 479 inclusive, 489; Wilkins, Hodson & Co. pool account, 541, I. Hodson, Jr., 530; 446 to 452 inclusive; No. 2 account, I. Hodson, Jr., 539; No. 3 account I. Hodson, Jr., 544; special account, I. Hodson, 575; Hodson & Salsbury 538; Baldwin & Farnham 519 and 270 to 276 inclusive. Dick Bros. & Co., No. 2 account 411–12; Toland Bros. & Co. 416, bills

391 payable 183, from and including July 12th; profit and loss account 390, capital assets and liabilities page 9 of the cash book; assets and liabilities of Valentine & McAvoy, cash book 9; Wershiefer 614–16, 617, 618, 619.

Mr. BROWN: What has that to do with this case?

Mr. MORAN: To show the insolvency and character of their dealings.

The COURT: There is no evidence showing there was any speculative accounts carried on by Wershiefer.

Mr. MORAN: They are the correspondents of the defendants in New York.

The COURT: I think that is too remote. There is no reference to it.

Mr. MORAN: It is offered to show the character of their dealings on the question of insolvency and how they stood from time to time.

The COURT: It will make this record most voluminous if it goes up, and so far there is not a shred of evidence as to that account.

Mr. MORAN: We are not so much interested in the size of the record if it goes up.

The COURT: I will sustain the objection. There is no evidence so far in connection with that account.

Said accounts offered in evidence (excepting the Wershiefer account) are as follows:

392 Mr. MORAN: We offer the account of E. & C. Randolph, page 600, 1, 2, 3, 4, 5, 6, 7, 8 and 9 on the question of the insolvency.

Objected to by counsel for defendant; objection sustained.

Mr. MORAN: We offer the account of Dick Brothers & Lawrence, the New York firm.

The COURT: That is competent, I believe.

Mr. BROWN: I have no objection to any of it except its voluminousness. If it is desirable to have it in, I have no objection.

Mr. BURKE: Page 342 to 354 inclusive. That includes the account of Dick Brothers & Rowe on page 354. It is all in one account.

All said accounts offerred in evidence will be found in following pages of the bill of exceptions.

393 JOHN E. BURKE, the plaintiff herein, having been recalled on his own behalf was further examined by Mr. Moran, and testified as follows:

Q. Have you ascertained from the books of the defendants whether they had any Chesapeake & Ohio stock in the month of January, 1895?

A. Yes, sir, I have ascertained that they did not.

Q. State what the fact is.

Objected to by counsel for defendant-; which objection is overruled by the court; to which ruling of the court, the defendants, and each of them, by their counsel, then and there duly excepted.

A. They didn't have any. They had none, no, sir.

Q. Do you know whether or not they had any stock on the first of April, Chesapeake & Ohio stock?

A. I testified before when I was on the stand that they didn't have any Chesapeake & Ohio.

The COURT: Does the record show, Judge Moran, what was the value of this stock on the day of the commencement of this suit?

Mr. MORAN: No, sir.

Mr. VROOMAN: They don't claim that.

The COURT: What date, according to your theory, is the measure of damages fixed at?

394 Mr. PENCE: The date of the conversion.

The COURT: When did you demand the delivery of this stock to you?

Mr. MORAN: That was May.

Mr. PENCE: May 21st.

The COURT: Is there anything in the record to show what he demanded in his talk?

Mr. PENCE: No, but I don't think that is the measure according to the decisions in this State at all.

Mr. BROWN: There is a stipulation here that Mr. Burke got me to sign covering the quotations of this stock for a very long time. We made a stipulation that the Financial Chronicle could be used, that everything in it could be considered in evidence. But we are

perfectly willing to stipulate. I don't know where it is. You came around *with* to my office with it.

A. I have got it.

Mr. MORAN: Is that in the case?

Mr. BROWN: It is not in the case, but we are perfectly willing to stipulation.

A. There was a stipulation entered into between Mr. Brown, Mr. Vrooman and myself that the Financial Chronicle should be regarded as reliable authority upon the market prices of stocks.

Q. At any time?

A. At any time.

The COURT: Is that in evidence, the Financial Chronicle?

395 Mr. BROWN: I don't think it is, but we are perfectly willing to stipulate the court may consider as proved anything that appears in the Financial Chronicle as to the quotations of Metropolitan Traction stock; that it is to be considered the market value of that day, of that stock at any date.

Mr. VROOMAN: Where is the Chronicle?

Mr. BROWN: It is in the public library, or the stock exchange or the law library. I guess. I don't think it cuts any figure, the question of damages here, myself.

Mr. MORAN: There is some evidence that we have not got here to-night that we desire to put in. We do not desire to delay the other side.

Mr. BROWN: We want to know your case before we commence.

Mr. MORAN: You know our case now.

Mr. BROWN: You have put in considerable this time that you didn't put in before.

Mr. VROOMAN: In order to make certain the entire account is in we desire to offer the balance of Mr. Burke's account.

The COURT: Yes, the whole account went in.

Mr. VROOMAN: In order to avoid that I offer pages 526 and 585 of the ledger. (These are found in following pages.

396 Counsel for plaintiff desires it admitted that the Financial Chronicle is reliable authority on the market prices of stocks therein quoted, that the prices so quoted are from actual sales and that the highest market price of Metropolitan Traction stocks as shown by said Chronicle were as follows on the following days:

On June 4, 1895, $97. per share
On June 18 1895, $97.⅜ per share
On June 19, 1895, $97.¼ per share
On June 20 1895, $98.⅜ per share
On June 21 1895, $100.¼ per share
On June 25 1895, $103.¼ per share
On July 6 1895, $103.½ per share
On Nov. 19 1895, $115. per share
On April 29 1899 $247.¾ per share

Counsel for defendants admit the fact so to be, insisting however that all such quotations are irrelevant and immaterial as evidence in this cause.

397 Court met at 10 o'clock, a. m, January 7th, 1901.

CHARLES L. BOYD, a witness called on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Burke, and testified as follows:

Q. What is your name?
A. Charles L. Boyd.
Q. Where do you live?
A. 486 East 42nd street.
Q. In this city?
A. Chicago, Illinois.
Q. How long have you resided in Chicago?
A. I have lived here 51 years.
Q. What has been your business Mr. Boyd for the last 20 years?
A. I have been receiver's business, acting and working for receivers.
Q. Have charge of estate during that time?
A. Yes, sir, several hundred.
Q. Have you had any experience in closing up the business of insolvent firms?
A. Yes sir.
Q. To what extent?
A. Well, I have handled quite a number of banks, several insurance companies, mercantile, manufacturers and all kinds of business during that time.
Q. In what business were you employed about the 20th of May 1895?
398 A. I was chief clerk for the Chicago Title & Trust Company.
Q. Receiver in the case of Valentine *vs.* Crawford?
A. Yes sir.
Q. What connection if any, did you have with the insolvent firm of Crawford & Valentine?
A. I had charge of the estate from the commencement and for several months after that.
Q. When did you take charge of it?
A. I took charge on the 20th of May.
Q. What year?
A. 1895. I proceeded with the order of court appointing the Chicago Title & Trust Company receiver, to the office of Crawford & Valentine at 118 La Salle street I think it was.
Q. In what business was Crawford & Valentine—what were they engaged in?
A. They were in the brokerage business.
Q. You proceeded you say to the office?

A. Of Crawford & Valentine, yes.
Q. On that day?
A. Yes sir.
Q. About what time on that day?
A. Between 11 o'clock and twelve o'clock, it was before noon, and took possession of the office and the books and papers on behalf of the receiver.
Q. What did you then do?
A. I then instructed the book-keepers to close up the books, after taking possession of all of the papers that I could, making
399 inventory memorands and instructing the book-keeper to close up the books.
Q. Who were the parties that you employed to close up the books?
A. There was a Mr. Campbell who was one of the book-keepers; then there was Mr. Kilgore, who said he was——
Q. What was his full name—Joseph T. Kilgore?
A. I think that was the name, yes sir.
The COURT: Haven't you been all over this ground before? Any dispute about this? That has been shown, that won't be disputed. He was one of the clerks of the old firm, wasn't he?
Mr. BURKE: What was he?
A. He said he was manager for the firm.
Q. Will you take the ledger up where you can handle it. Just look at that and tell the court whether it is the ledger of Crawford & Valentine?
A. Yes sir, this is the ledger of Crawford & Valentine which I took possession of on that day.
Q. Now state to the court Mr. Boyd if you please how you closed the account?
A. Well, I ordered all of the entries made upon that date to be made in red ink.
Q. From what date?
A. From the 20th of May, 1895.
Q. I will ask you right here now whether any entries were made in the books of Crawford & Valentine, after you took possession of them, except such as were made under your directions?
400 A. Well, I don't think they were, but my instructions were to make them—that is my instructions were to the book-keeper to make such entries as were necessary to close the account.
Q. No other person had possession of the books after you took possession of them except the parties you employed to close up the books?
A. No sir, they were in the possession of the Chicago Title & Trust Company so far as I know as long as I was in their employ.
Q. Now how were the accounts closed?—what was the method of closing them where the customers appeared to be "long" in stocks or "short" in stocks?
A. Well, where there accounts appeared as if they had stock on hand——

Q. Yes?

A. (Continuing:) And there was no stock to be found, why that account was closed at the highest price or the price during the day of the 21st of May I think it was.

The COURT: Highest price?

A. Highest market price, regular market price of the stock.

Mr. BURKE:

Q. That is if the customer appeared to have stocks what was done?

A. Why the account was credited at the market price.

The COURT: Of the stocks?

A. Of the stocks.

Mr. BURKE: Without anything more—no sale made?

401 A. No sale made because we had no stock.

Q. Now supposing the customer appeared to have stocks sold short what kind of ane entry would you make in a case of that kind?

A. Why, an entry would be made as if the stock had been purchased at the market price on that date.

Q. That is you charged him with the market price of the stock that day if he appeared to be short?

A. Yes sir.

Q. And you credited him with the market price of the stock that day if he appeared to be long?

A. Yes sir.

Q. And closed the account in that way?

A. Yes sir.

The COURT: In other words you put on the papers or books the result of what it would have been if you made a sale or purchase?

A. Yes sir.

Q. Without making a sale or purchase?

A. Yes sir.

Mr. BURKE: Will you please turn to R. C. Crawford's local account, page 201, turn to the close of the accounts, where you balance them. Have you got them?

A. Yes sir.

Q. What was the result of the closing of that account?

A. It shows a debit balance of $36,893.89.

Q. That R. C. Crawford owed?

A. Showing a debit balance.

Q. Against him?

A. Yes sir.

Q. On the books?

A. Yes sir.

Q. Now turn to page 233, his No. 2 account?

402 The COURT: I think that is the account we already had.

Mr. BURKE: No I am showing the result.

Q. What was the result of the closing of that account—his No. 2 account?
A. That shows a debit balance of $15,867.82.
Q. Now turn to his No. 3 account, page 234?
A. That account appears to be closed.
Mr. PENCE: What account is that?
A. No. 3, R. C. Crawford's.
The COURT: That is closed?
A. Closed.

Mr. BURKE:

Q. No balance to it?
A. Balance to J. T. Kilgore's credit—account closed, no balance—the balance of that account was placed to the credit of J. T. Kilgore.
Q. Now turn to New York account, page 220—it is carried from that page to page 224 isn't it?
A. Yes sir.
Q. It is closed is it on page 228?
A. Yes sir.
Q. What was the result there?
A. Shows a debit balance of $26,153.28.
Q. Against him?
A. Yes sir.
Q. Turn to special account page 229—have you got it?
A. Yes sir.
Q. What was the result of the closing of his account there?
A. That appears to be closed—abalanced.
Q. What was the result?
A. No debt or credit balance there—just closed up.
Q. Please turn now to E. A. Valentine's account on page 245—have you got it?
A. Yes sir.
403 Q. What was the result of the closing of his account?
A. Shows a debit balance of $7,112.52.
Q. Against him?
A. Yes sir.
Q. Turn now to his No. 2 account on page 252, what was the result of the closing of the account?
A. Shows the debit balance of $14,957.10.
Q. Now turn to "stocks and bonds" account, closed on page 395—have you found it?
Mr. VROOMAN: That is in evidence, isn't it?
Mr. BURKE: What was the result of the closing of that account?
A. That shows a debit balance of $17,932.95, and also it has a memoranda here of "Long 83 shares New York Biscuit, 50 shares Chicago Packing and Provision Company and 200 shares of Chicago Brewing and Malting Company," and on the credit side it says "Short 100 shares of street car line and 50 shares of Lake street L."
Q. Now turn to the account of Stanley & Crawford, on page 570. Was that account closed?

A. That account shows a debit balance of $332.23.
Q. Now turn to the account of Stanley & Valentine on page 571?
A. Yes sir.
Q. Tell me what was the result of the closing of that account?
A. This account was closed on April 30th by a debit bal-
404 ance charged to Stanley & Crawford's account, just referred to on page 570.
The COURT: It was balanced at the time of the failure?
A. It was balanced at the time of the failure.
Mr. BURKE: Turn to the account of P. E. Stanley.
Mr. BROWN: Isn't that immaterial?
The COURT: The books are already in, all of these accounts. In arguing why can't you call attention to that. All of these items are already in evidence.
Mr. BROWN: I dislike to object to anything in the books because we don't want to conceal anything.
The COURT: Hand them to your counsel, and in arguing they will call my attention to any particular item.
Mr. BURKE: There is one account I want to show.
The COURT: Isn't it already in evidence?
Mr. BURKE: It is in regard to J. R. Wilkins, and the changing of the account. Will you turn to account of J. R. Wilkins on page 479? That your honor will remember was testified to as having been changed.
Q. How do you find it on the book?
A. It appears to have been changed.
Q. From what to what?
A. It appears to have been changed from Jos. R. Wilkins to Jas. R. Watkins.
Q. Was that change made by you?
A. No sir.
Q. Do you know how it was made?
A. No sir.
Q. Do you know when it was made?
A. No sir.
Q. In what shape was it when it came into your hands?
405 A. I can't say positively but I think it was in that shape
The COURT: In the present form?
A. Yes sir; if I may be allowed I will state my reasons.
The COURT: Yes.
—. The reason is this: I made up a list of the debtors and creditors immediately after these came into the possession of the receiver, and I have the account "Joseph R. Watkins," and that is the reason I believe it was not changed at the time it came.
Q. You mean it was not changed after?
A. After it came into the hands of the receiver.

Mr. BROWN:

Q. You said this account was made up three or four days after this?

A. Yes sir.
Q. It might have been made in three or four days?
A. It might have.
Q. These books were in the hands of Mr. Kilgore and Mr. Campbell?
A. They were in the hands of Mr. Kilgore and Mr. Campbell yes, in a room separated from the office.

(Cross-examination waived.)

406 CHARLES M. WALKER, a witness called on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Burke and testified as follows:

Q. What is your full name?
A. Charles M. Walker.
Q. What is your business and occupation?
A. I am a lawyer.
Q. Did you know R. C. Crawford and E. A. Valentine in 1894 and 1895?
A. I did.
Q. Did you ever have any business with them?
A. Yes sir.
Q. I hand you now a paper which you will please look at, and ask you if that is a bill you rendered to the receiver for your professional services?
A. Yes sir, it is.
Q. About October 1st 1894 was there an account put in your hands in favor of Crawford & Valentine and against one I. Hodson for about $35,000?
A. Yes sir.
Q. By R. C. Crawford?
A. Yes sir.
Q. State Mr. Walker what efforts you made to collect that account?
A. Why I remember of having written a number of times about it, and having made inquiries.
Q. Of whom?
A. I really can't say now, it is so long ago; had a number of consultations with them in regard to the matter. I have really forgotten the incident.
Q. How long did you have the account?
A. That I can't say; some time.
407 Q. Perhaps that might refresh your recollection, of about how long you had the account?
A. Well, from this I should judge I had it from about the first of October to the first of March.
Q. The first of October of what year?
A. 1894 to the first of March 1895.
Q. Did you collect it?

A. No, I didn't collect it.

Q. Why?

A. Couldn't, because the man was not good for it, and was away from here besides.

Q. Look at the second item in that account and I will ask you if Crawford & Valentine, or either of them, placed in your hands an account against anyone else except I. Hodson?

A. Yes sir, here is a charge here for services for collecting an account against Dr. Meers at Kenosha.

Q. Did you collect that?

A. I don't remember whether I did or not; I don't remember how much the account was for now.

Q. Is your account O. K.'d by R. C. Crawford?

A. Yes sir.

Cross examination.

By Mr. BROWN:

Q. I see the services in the Hodson matter Mr. Walker run from October 1st to March 1st?

A. I see it from that bill; I have no recollection of it.

Q. You know what your instructions were—you remember
408 about that?—were they to bring suit or negotiate for settlement or get securities or what?

A. As I remember it, it was a desperate account, and they put the matter into my hands to have the best done with it that could be done; I don't remember now just what specific instructions were given, except what I did to collect it.

Q. Mr. Walker, are you quite sure that this Hodson account was put into your hands October 1st, or that this bill of yours covered all the conversations and matters that you had concerning the business up to March 1st, and some time subsequent to October 1st?

A. You mean whether the account was actually placed in my hands on the first of October?

Q. Yes, whether you remember that, or whether you had it as early as that, or whether it may have been placed in your hands later, and your bill was made to include five months, between October 1st and March 1st, or whenever your services occurred?

A. They began consulting me about the first of October at any rate, but whether the account actually came into my hands on that day I don't remember.

Q. Now if it appears from the books Mr. Walker that upon the 1st of October Mr. Hodson had a credit balance with the firm, what would you say then?

Mr. BURKE: That is the most false assumption I ever heard.

A. I should still say——

409 Mr. BROWN: That you had been consulted about the account?

A. That these people, that they began consulting me about the Hodson account on the first of October.

Re-direct examination.

By Mr. BURKE:

Q. Didn't they tell you Mr. Walker when they handed it to you it wasn't good for anything?
A. It was a desperate account.
Q. The Hodson account?
A. I understood it was a desperate account, as I remember it.
Q. That is all.

Mr. BURKE: We now offer in evidence in connection with the books and the accounts in the books the petition of the defendants in bankruptcy which contains a list of all their creditors that existed on the date of the failure, on the 20th day of May 1894, and a list of the amounts due to each and the character of the indebtedness.

Mr. BROWN: What is this offer for?

Mr. BURKE: This is a petition in bankruptcy.

Which said petition, so offered in evidence is in the words and figures following, to-wit:

410 To the Honorable Christian C. Kohlsaat, judge of the district court of the United States for the northern district of Illinois:

The petition of Richard C. Crawford and E. Archibald Valentine respectfully represents that your petitioners have been partners under the firm name of Crawford & Valentine, having their principal place of business at Chicago in the county of Cook and district and State of Illinois, for the greater portion of the six months next preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked "A," and verified by the oath of your petitioners, contains a full and true statement of all the debts of said partners, and as far as possible the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked "B," verified by the oath of your petit-oners, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said Richard C. Crawford further states that the schedule hereto annexed, marked "C," verified by his oath, contains a full and true statement of all his individual debts, and as far as possible

the names and places of residence of his creditors, and such
411 further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked "D," verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said E. Archibald Valentine further states that the schedule hereto annexed, marked "E," verified by his oath, contains a full and true statement of all his individual debts, and as far as possible the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed marked "F," verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm, and the individual members thereof, may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

CRAWFORD & VALENTINE.
RICHARD C. CRAWFORD.
E. ARCHIBALD VALENTINE.

FLOWER, SMITH & MUSGRAVE AND
PECKHAM, BROWN & PACKARD,
Attorneys for Petitioners.

412 Richard C. Crawford and E. Archibald Valentine, the petitioning debtors mentioned and describee in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information and belief.

RICHARD C. CRAWFORD,
E. ARCHIBALD VALENTINE,
Petitioners.

Subscribed and sworn to before me this 29th day of April, A. D. 1899.

VICTOR M. HARDING,
[NOTARIAL SEAL.] *Notary Public.*

FORMS IN BANKRUPTCY,
As adopted and established by the U. S Supreme Court.

SCHEDULE A.

Creditors whose Claims are

(N. B.—When the name and residence (or either) of any drawer, maker, indorser or holder of any bill or note, &c., are unknown, the fact must be st
in full, and any claim by way of set off stated

REFERENCE TO LEDGER OR VOUCHER	NAMES OF CREDITORS.	RESIDENCE (if unknown that fact must be stated)	WHEN AND WHERE C
Copy	A. H. Andrews & Co.	304 Wabash Ave. Chicago	Chicago in
	F. L. Feager	108 La Salle St. "	"
	Burton Johnson	C. & N. W. R. R. Gen. Office "	"
	A. L. Baker	Continental Bank Bldg "	"
	F. G. Mitchell	1016 Ashland Bldg. "	"
	J. W. Kilmore	Adams Exp. Bldg. "	"
	A. J. Canfield	Chicago, Ill.	"
	A. Warner	" "	"
	Charles B. Evans	Montauk Blk. Chicago	"
	Warren L. Beckwith	Chicago Work Exch. "	"
	Frank E. Coyner	Internal Rev. Office "	"
	Estate of John L. Hopkins	Philadelphia, Pa	"
	E. L. L. Swayne	New York City	"
	Wm. M. Salisbury	109 Madison St. Chicago	"
	Int. R. R. Publishing Co	Chicago, Ill.	"
	W. H. & J. H. Moore	Amer. Exp. Bldg. "	"
	Maud Baggett	Chicago, Ill.	"
	Frances M. Pratt	" "	"
	Estate of J. Chamberlain	" "	"
	E. Dingley	" "	"
	Simon W. Thanes	Work Exch. Bldg. Chicago	"
	C. H. Kellogman,	Kenosha, Wis.	"
	anna Crawford,	address unknown	"

IN BANKRUPTCY,
shed by the U. S Supreme Court.

Printed and for Sale by the Independent-Times Printing Co., Streator, Ill.

SCHEDULE A. (3)

Creditors whose Claims are Unsecured.

nd residence (or either) of any drawer, maker, indorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set off stated in the schedule of property.

NAMES OF CREDITORS.	RESIDENCE (if unknown that fact must be stated)	WHEN AND WHERE CONTRACTED.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c. and whether contracted as partner of joint contractor with any other person, and if so with whom	AMOUNT. $	AMOUNT. c
J. K. Andrews & Co.	304 Wabash Ave. Chicago	Chicago in 1894 & 5	Balance of account for Book transactions	4 05	80
C. L. Fraser,	108 LaSalle St. "	" " "	" " " "	2 58	90
Burton Johnson	Co. N. W. R. A. Gen. Office "	" " "	" " " "	8 66	25
A. L. Baker	Continental Bank Bldg "	" " "	" " " "	3 42	46
C. G. Mitchell	1016 Ashland Blg. "	" " "	" " " "	8 87	64
W. Kilmore	Adams Exp. Bldg. "	" " "	" " " "	5 36	67
A. J. Canfield	Chicago, Ill.	" " "	" " " "	1 02	40
C. Manier	" "	" " "	" " " "	74	38
Charles B. Evans,	Mortland Blk. Chicago	" " "	" " " "	8 26	42
Warren L. Beckwith	Chicago Stock Exch. "	" " "	" " " "	34	00
Frank E. Coyne,	Internal Rev. Office "	" " "	" " " "	3 41	09
Est of John L. Hopkins	Philadelphia, Pa	" " "	" " " "	153	00
W. L. Swayne	New York City,	" " "	" " " "	85	00
Mrs M. Salisbury	109 Madison St. Chicago	" " "	" " " "	9 56	25
Inter R. R. Publishing Co	Chicago, Ill.	" " "	" " " "	17	00
H. & J. H. Moore	Amer. Exp. Bldg. "	" " "	" " " "	5 18	77
Paul Bagget	Chicago, Ill.	" " "	" " " "	5 36	66
Frances M. Pratt	" "	" " "	" " " "	24	23
Est of J. Thomasers	" "	" " "	" " " "	10 52	21
E. Dinsley	" "	" " "	" " " "	10 70	81
Simon P. Thanas	Book Exch. Bldg. Chicago	" " "	" " " "	2 12	50
E. H. Kellogman,	Kenosha, Wis.	" " "	"	2 792.	14
Emma Crawford,	address unknown	" "	" Crawford & Valentine. "	Total Petitioners	127.89

FORMS IN BANKRUPTCY,
As adopted and established by the U. S Supreme Court.

Printed and for Sa

SCHEDULE A. (3)

Creditors whose Claims are Unsecured.

(N. B.—When the name and residence (or either) of any drawer, maker, indorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debt
in full, and any claim by way of set off stated in the schedule of property.

Copy

REFERENCE TO LEDGER OR VOUCHER	NAMES OF CREDITORS.	RESIDENCE (if unknown that fact must be stated)	WHEN AND WHERE CONTRACTED.	Nature and consideration of the debt, and whether a bill of exchange, promissory note, &c. and wh partner of joint contractor with any other person
	Minnie N. Barnes	Houghton Apartment Bldg. Chicago	Chicago in 1894 - 5	Balance of account for Boa
	J. R. Owen	% Lord Owen & Co.	" " "	" " "
	Dr. J. H. Baker	" Chicago Veterinary College	" " "	" " "
	Michael J. Riley	Chicago, Ill.	" " "	" " for Tales
	Waukesha Mineral Springs Co.	Chicago, Ill.	" " "	" " " Mine
	Western Union Telegraph Co.	Western Union Bldg. Chicago	" " "	" " " Telegr
	Chicago Evening Post	Evening Post " "	" " "	" " " Ad
	The Economist	Montauk " "	" " "	" " "
	Chicago Evening Journal	Evening Journal " "	" " "	" " "
	William C. Seward	New York City	" " "	assignee account from "Mo and Trust Co. of Chicago, d advances in judgment "M Superior Court of Cook County
	Merchants Loan & Trust Co.	Chicago, Ill.	" " "	Balance of account for s actions and money ad
	L. D. Mattes	Chicago Board Trade Bldg Chicago	" " "	Balance of account for stock
	Charles M. Walker	" " " "	" " "	" " " legal
	B. M. Kendall	Chicago, Ill.	" " "	" " " stock
	Catherine L. Baker	% A. H. Baker, Chicago Veterinary College, Chicago	" " "	" " " " Note of your petitioners h term given in settlement, exact amount or the date them are unknown to you

Crawford & Vale

N BANKRUPTCY,
d by the U. S Supreme Court.

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SCHEDULE A. (3)

Creditors whose Claims are Unsecured.

l residence (or either) of any drawer, maker, indorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set off stated in the schedule of property.

NAMES OF CREDITORS.	RESIDENCE (if unknown that fact must be stated)	WHEN AND WHERE CONTRACTED.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c. and whether contracted as partner of joint contractor with any other person, and if so with whom	AMOUNT. $	AMOUNT. c
nnie N. Barnes	Houghton Apartment Bldg. Chicago	Chicago in 1894-5	Balance of account for stock transactions	56	89 70
R. Owen	C/o Lord Owen & Co.	" " "	" " " "	33	52 74
J. H. Baker	" Chicago Veterinary College	" " "	" " " "	2	28 98
chard J. Kiley	Chicago, Ill.	" " "	" " for Toilet Supplies		2 55
ela Mineral Springs Co.	Chicago, Ill.	" " "	" " Mineral Waters		3 19
n Union Telegraph Co.	Western Union Bldg. Chicago	" " "	" " Telegraph Services		19 90
icago Evening Post	Evening Post " "	" " "	" " Advertising		5 44
Economist	Montauk " "	" " "	" " " "		20 91
icago Evening Journal	Evening Journal " "	" " "	" " " "		2 55
illiam C. Newall	New York City	" " "	assigned account from "Merchants Loan and Trust Co. of Chicago, due for money advanced in Judgment May 6, 1898 in Superior Court of Cook County No. 190457	198	78 19
chants Loan & Trust Co.	Chicago, Ill.	" " "	Balance of account for stock transactions and money advanced	107	74 08
D. Mather,	Chicago Board Exch. Bldg Chicago	" " "	Balance of account for stock transactions	6	75 26
rles M. Walker	" " "	" " "	" " Legal services	2	55 00
W. Kendall,	Chicago, Ill.	" " "	" " stock transactions	15	20 18
thorne L. Baker	C/o A. H. Baker, Chicago Veterinary College, Chicago	" " "	" " " " " Note of your petitioners have since been given in settlement, but the exact amount or the details concerning them are unknown to your petitioners	11	70 00
			TOTAL		

Crawford & Valentine PETITIONER.

FORMS IN BANKRUPTCY,
As adopted and established by the U. S. Supreme Court.

Printed and for sale by the INDEPEND

SCHEDULE A. (3)

Creditors Whose Claims are Unsecured.

(N. B.--When the name and residence (or either) or any drawer, maker, indorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

REFERENCE TO LEDGER OR VOUCHER	NAMES OF HOLDERS AS FAR AS KNOWN	RESIDENCE (if unknown that fact must be stated)	PLACE WHERE CONTRACTED	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as partner of joint contractor with any other person, and if so with whom.
M.	Estate Geo. M. Pullman	Rob't T. Lincoln, Executor Pullman Bldg. Chicago	Chicago in 1894-5	Balance of account for stock trans Judgment recovered in Circuit Cou Cook Co. No. 175761 on Mch. 28, 1
	Charles W. Barnes	Clifton House, Chicago	" "	Balance of account for Stock Trans
	All the foregoing claims were filed with the Receiver, Pro Chicago Title & Trust Co. appointed			
	said Bankrupt firm of Crawford & Valentine in suit No. 143			of 41 in Circuit Court of Cook C
	and a 15% dividend was paid Harrison, the amount stated are			the balances due after deducti
	said 15% dividend.			
	Dietz Bros. & Co.	Phila. Pa.	Chicago in 1894 & 5	Balance of account for Stock Transa in judgment Sept 24, 96 in Circuit Cou
	A. B. Baker	Chicago, Ill.	" "	Cook Co. No. 158237 Balance of account for Stock Transa
	Annie Campbell	"	" "	
	Victor Falkenau	108 LaSalle St. Chicago,	" "	Balance of account for Stock Transa for which there is judgment not given, upon date May 24 1897 for payable to Victor & Louis Falken
	E. E. Chase	State of Texas, other address unknown,	" "	judgment with 5% interest Balance of account for Stock Trans upon which judgment for $94.22 in favor of July 2, 1898 in the Circu Court of Cook County No. 149583
	John E. Burke,	95 Washington St. Chicag	" "	Balance of account for Stock Tra

Crawford & Valentin

N BANKRUPTCY,
ed by the U. S. Supreme Court.

Printed and for sale by the INDEPENDENT-TIMES PRINTING CO., Streator, Ill.

SCHEDULE A. (3)

Creditors Whose Claims are Unsecured.

(N. B.--When the name and residence (or either) or any drawer, maker, indorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

ES OF HOLDERS AS FAR AS KNOWN	RESIDENCE (If unknown that fact must be stated)	PLACE WHERE CONTRACTED	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as partner of joint contractor with any other person, and if so with whom.	AMOUNT $	AMOUNT c
to Geo. M. Pullman	Robt. T. Lincoln, Evanston Pumps Bldg. Chicago	Chicago in 1894-5	Balance of account for stock transaction Judgment recovered in Circuit Court Cook Co. No. 175761 on Mch. 28. 1898.	3978	00
arles H. Barnes	Clifton House, Chicago	" "	Balance of account for Stock Transaction	1014	70
the foregoing	claim were filed with	the Receiver, The Chicago Title & Trust Co. appointed for			
's Bankrupt firm	of Crawford & Valentine in suit No. 143	044 in Circuit Court of Cook County			
d a 15% dividend	was paid Harrison, the amount stated are	the balances due after deducting			
's 15% dividend.					
p Bros. & Co.	Phila. Pa.	Chicago in 1894 & 5	Balance of account for Stock Transaction in judgment #42496 in Circuit Court	372	72
H. Baker	Chicago, Ill.	" "	Cook Co. No. 158223 Balance of account for Stock Transaction	269	37
nis Campbell	" "	" "	" " " " " "	150	33
ton Pal Kenan	108 LaSalle St. Chicago,	" "	Balance of account for Stock Transaction for which there is judgment pretty soon given, 1898 dated May 24 1897 for 1832 payable to Clinton & Louis Pal Kenan on	2584	00
E. Chase	State of Texas, other address unknown,	" "	defendant with 5% interest Balance of account for Stock Transaction upon which judgment for $494 was recovered July 24 1896 in the Circuit Court of Cook County No. 149583	494	22
lm E. Burke,	95 Washington St. Chicago	" "	Balance of account for Stock Transaction	746	54
			Total		

Crawford & Valentine. Petitioner.

413 SCHEDULE "A."

Statement of all debts of bankrupt firm of Crawford and Valentine, composed of Richard C. Crawford and E. Archibald Valentine.

SCHEDULE "A" (1).

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

(1.) Taxes and debts due and owing to the United States: None.
(2.) Taxes due and owing to the State of Illinois, or to any county, district, or municipality thereof: None.
(3.) Wages due workmen, clerks, or servants: None.
(4.) Other debts having priority by law: None.

CRAWFORD & VALENTINE.

414 SCHEDULE "A" (2).

Creditors holding securities: None.

CRAWFORD & VALENTINE.

(Here follow fac-similes marked pp. 415, 416, and 417.)

418 SCHEDULE "A" (4).

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers: None.

CRAWFORD & VALENTINE.

419 SCHEDULE "A" (5).

Accommodation paper: None.

CRAWFORD & VALENTINE.

420 *Oath to Schedule "A."*

UNITED STATES OF AMERICA, } ss:
District of Illinois, }

On this 29th day of April, A. D. 1899, before me personally came Richard C. Crawford and E. Archibald Valentine, the persons mentioned in and who subscribed to the foregoing schedule, and who being first duly sworn by me did severally declare the said schedule to be a statement of all their debts, in accordance, with the acts of Congress relating to bankruptcy.

[NOTARIAL SEAL.] VICTOR M. HARDING,
Notary Public.

421 SCHEDULE "B."

Statement of all property of bankrupt firm of Crawford & Valentine, composed of Richard C. Crawford & *and* E. Archibald Valentine.

SCHEDULE "B" (1).

Real estate: None.

CRAWFORD & VALENTINE.

422 SCHEDULE "B" (2).

Personal property: None.

CRAWFORD & VALENTINE.

423 SCHEDULE "B" (3).

Choses in action: None.

CRAWFORD & VALENTINE.

424 SCHEDULE "B" (4).

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge: None.

CRAWFORD & VALENTINE.

425 SCHEDULE "B" (5).

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use: None.

CRAWFORD & VALENTINE.

426 SCHEDULE "B" (6).

Books, papers, deeds, and writings relating to bankrupt firm's business and estates.

Books: None.
Deeds: None.
Papers: None.

Your petitioners state that a bill was filed in the circuit court of Cook county, in cause number 143,041, on May 20th, 1895, by E. Archibald Valentine against Richard C. Crawford, asking for a dissolution of said bankrupt firm of Crawford & Valentine; that the Chicago Title & Trust Company was duly appointed receiver in said cause on May 21st, 1895; that said receiver took charge of the assets of said firm and has since distributed the same and has paid to such creditors as filed their claims and whose claims were allowed a 15 % dividend upon May 5th 1896. The said cause is still pending.

CRAWFORD & VALENTINE.

427 *Summary of Debts and Assets.*

(From the statements of the bankrupt in Schedules A and B.)

Schedule A. 1 (1)	Taxes and debts due United States....	
" " 1 (2)	Taxes due States, counties, districts and municipalities	
" " 1 (3)	Wages.....	
" " 1 (4)	Other debts preferred by law.....	
Schedule A. 2	Secured claims	
Schedule A. 3	Unsecured claims.....	$142,077 07
Schedule A. 4	Notes and bills which ought to be paid by other parties thereto.....	
Schedule A. 5	Accommodation paper.....	
	Schedule A, total.....	$142,077 07

Schedule B.	1	Real estate .....
Schedule B.	2-*a*	Cash on hand ....
" "	2-*b*	Bills, promissory notes, and securities.....
" "	2-*c*	Stock in trade .....
" "	2-*d*	Household goods, &c.....
" "	2-*e*	Books, prints, and pictures .....
" "	2-*f*	Horses, cows and other animals .....
" "	2-*g*	Carriages and other vehicles .....
" "	2-*h*	Farming stock and implements... ..
" "	2-*i*	Shipping and shares in vessels.....
" "	2-*k*	Machinery, tools, &c.....
" "	2-*l*	Patents, copyrights, and trade marks..
" "	2-*m*	Other personal property.....
Schedule B.	3-*a*	Debts due on open accounts .....
" "	3-*b*	Stocks, negotiable bonds, &c. .....
" "	3-*c*	Policies of insurance .....
" "	3-*d*	Unliquidated claims .....
" "	3-*e*	Deposits of money in banks and elsewhere .....
Schedule B.	4	Property in reversion, remainder, trust, &c.....
Schedule B.	5	Property claimed to be excepted.....
Schedule B.	6	Books, deeds, and papers .....

Schedule B, total.....

CRAWFORD AND VALENTINE.

428 *Oath to Schedule "B."*

UNITED STATES OF AMERICA, }
District of Illinois, } ss:

On this 29th day of April. A. D. 1899, before me personally came Richard C. Crawford and E. Archibald Valentine, the persons mentioned in and who subscribed to the foregoing schedule, and who being by me first duly sworn did severally declare the said schedule to be a statement of all their estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

VICTOR M. HARDING,
Notary Public.

[NOTARIAL SEAL.]

(Here follow fac-similes marked pp. 429 and 430.)

FORMS IN BANKRUPTCY.
As adopted and established by the U. S. Supreme Court.

Individual Creditors of Ric

SCHEDULE C

Creditors Whose Cla

(N. B.--When the name and residence (or either) or any drawe
unknown, the fact must be stated, and also the name and resi
due to each creditor must be stated in full, and any claim by

REFERENCE TO LEDGER OR VOUCHER	NAMES OF CREDITORS	RESIDENCE (If unknown that fact must be stated)	When and whe
Copy	The Northern Trust Co. Trustee for the Stewart Building	"The Rookery" Chicago. Illinois	Chicago. 1898
	Clayton B. Knowlton Albert W. Adcock & Herman J. Teufel copartners as Knowlton Adcock & Teufel.	66 State St. Chicago. Illinois	Date not Chicago.
	Dunlap & Co,	Palmer House Chicago, Illinois	August. Chicago.

BANKRUPTCY,
by the U. S. Supreme Court.

Individual Creditors of Richard C. Crawford

Printed and for sale by the INDEPENDENT-TIMES PRINTING Co., Streator, Ill.

SCHEDULE C (3).

Creditors Whose Claims are Unsecured.

(N. B.--When the name and residence (or either) or any drawer, maker, indorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

NAMES OF CREDITORS	RESIDENCE (if unknown that fact must be stated)	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as partner of joint contractor with any other person, and if so with whom.	AMOUNT $	AMOUNT cts.
Northern Trust Co. Trustee for the Rookery Building	"The Rookery" Chicago Illinois	Chicago October 1898	Guaranty of Lease to Crawford & Co (a corporation) of premises #53 Washington St. from Oct 1st 1898 to May 1, 1899, Rent due thereon, balance	125	00
Clayton B. Howard & Albert W. Adgate & Herman J. Penfold Partners as Howard, Adgate & Penfold.	#66 State St. Chicago Illinois	Date not known Chicago.	Judgment note given in settlement of an account amount due, about	60	00
Knapp & Co.	Palmer House Chicago, Illinois	August 94 Chicago Illinois	Merchandise sold	12	00
			Total.	186	00

Richard C. Crawford ..... Petitioner.

FORMS IN BANKRUPTCY.
As adopted and established by the U. S. Supreme Court.

Printed and for sale by the INDEPENDENT-TI

SCHEDULE C (5)

Accommodation Paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor o accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

REFERENCE TO LEDGER OR VOUCHER	NAMES OF HOLDERS	RESIDENCE (if unknown that fact must be stated)	NAMES AND RESIDENCES OF PERSONS ACCOMMODATED.	PLACE WHERE CONTRACTED	Whether liability was contracted as part or joint-contractor, or with any o person, and if so, with whom.
					To

Richard C. Crawford

UNITED STATES OF AMERICA,
Northern DISTRICT OF Illinois } ss.

OATH TO SCHEDULE A.

On this 28th day of April A. D. 1899, before me personally came Richard C. Crawford who subscribed to the foregoing schedule, and who being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this 28th day of April A. D. 1899.

George Packard
Notary

Notarial Seal

BANKRUPTCY,
by the U. S. Supreme Court.

Printed and for sale by the INDEPENDENT-TIMES PRINTING CO., Streator, Ill

SCHEDULE C (5)

Accommodation Paper.

ce or bills, and when due, with the names and residences of the drawers, makers and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

NAMES OF HOLDERS	RESIDENCE (if unknown that fact must be stated)	NAMES AND RESIDENCES OF PERSONS ACCOMMODATED.	PLACE WHERE CONTRACTED	Whether liability was contracted as partner or joint-contractor, or with any other person, and if so, with whom.	AMOUNT $	AMOUNT c
				Total,	1862	00

Richard C. Crawford Petitioner.

STATES OF AMERICA, } ss.
DISTRICT OF Illinois }

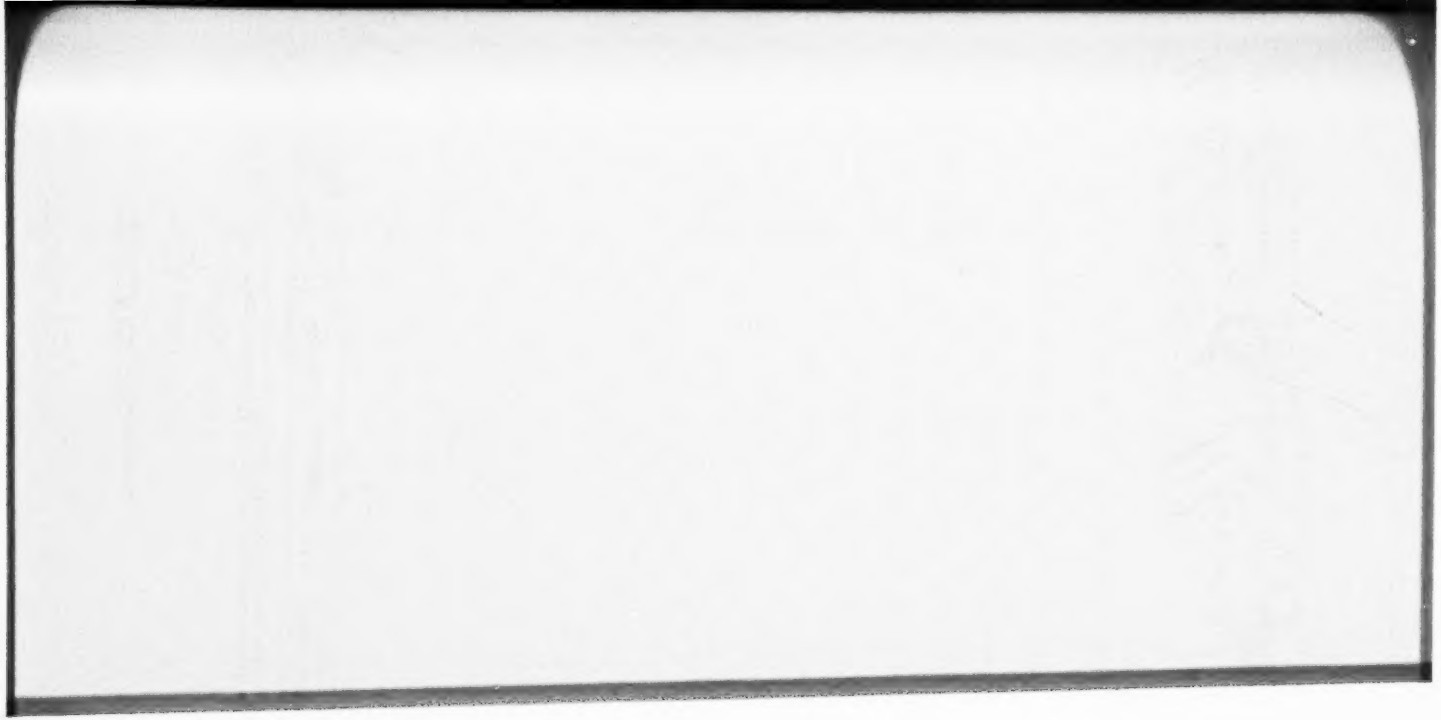
OATH TO SCHEDULE A.

28th day of April A. D. 1899, before me personally came Richard C. Crawford, the person mentioned in and g schedule, and who being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

n to before me this 28th day of April A. D. 1899. George Packard

Notary Public
(Official Character.)

Notarial



431 SCHEDULE D (2).

Individual Personal Property of Richard C. Crawford.

A. Cash on hand	25 00
B. Bills of exchange, promissory notes, or securities of any description, (each to be set out separately)	.....
C. Stock in trade, in — business of —— —— at —— of the value of	.....
D. Household goods and furniture, household stores, wearing apparel, and ornaments of the person, viz	.....
Wearing apparel	200 00
Watch and jewelry	175 00
E. Books, prints and pictures, viz	.....
F. Horses, cows, sheep, and other animals (with number of each), viz	.....

RICHARD C. CRAWFORD.

G. Carriages and other vehicles, viz	.....
H. Farming stock and implements of husbandry, viz	.....
I. Shipping and shares in vessels, viz	.....
K. Machinery, fixtures, apparatus and tools used in business; with the place where each is situated, viz	.....
L. Patents, copyrights and trademarks, viz	.....
M. Goods or personal property of any other description; with the place where each is situated, viz	.....
Total	400 00

—— ——, *Petitioner.*

Copy.

432 SCHEDULE D (5).

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

	Valuation $ c.
Military uniforms, arms and equipments.....	
Property claimed to be exempted by State laws, its valuation, whether real or personal; its description and present use, and reference given to the statute of the State creating the exemption.	
Cash on hand.....	25 00
Wearing apparel.....	200 00
Watch and jewelry.....	175 00
Claimed to be exempt by section 1 of an act of the legislature of the State of Illinois to exempt certain personal property from attachment and sale on execution and from distress for rent in force July 1, 1877, the petitioner being the head of a family and residing with the same at Chicago, Illinois.	
Total.....	400 00

RICHARD C. CRAWFORD, *Petitioner.*

433 SCHEDULE D (6).

Books, papers, deeds, and writings relating to bankrupt's business and estate.

The following is a true list of all books, papers, deeds and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore at any time in my possession or under my custody or control, and which

as now held by the parties whose names are hereinafter set forth, with the reasons for their custody for the same:

Books.....
Deeds.....
Papers, etc.....

RICHARD C. CRAWFORD, *Petitioner.*

Oath to Schedule B.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

On this 28th day of April A. D. 1899, before me personally came Richard C. Crawford the person mentioned in and who subscribed to the foregoing schedule, and who being by me first duly sworn to did declare the said schedule to be a true statement of all his individual estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

GEORGE PACKARD, [SEAL.]
Notary Public.
(Official character.)

634 SCHEDULE "E."

Statement of all the individual debts of the bankrupt E. Archibald Valentine.

SCHEDULE "E" (1).

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

(1.) Taxes and debts due the United States: None.
(2.) Taxes due and owing to the State of Illinois, or to any county, district, or municipality thereof: None.
(3.) Wages due workmen, clerks or servants: None.
(4.) Other debts having priority by law: None.

E. ARCHIBALD VALENTINE.

635 SCHEDULE "E" (2).

Creditors Holding Securities.

The bankrupt owes the State Mutual Life Assurance Company of Worcester, Massachusetts, for premiums due and unpaid upon a policy of insurance for $2000 issued on the life of the bankrupt, and

payable to his estate, the sum of about $60. This indebtedness is evidenced by the bankrupt's notes, held by said insurance company. The policy of insurance referred to and which is elsewhere scheduled has a cash surrender value of $55.98 which would be subject to the payment of the above indebtedness.

E. ARCHIBALD VALENTINE.

436 SCHEDULE "E" (3).

Creditors whose claims are unsecured: None.

E. ARCHIBALD VALENTINE.

437 SCHEDULE "E" (4).

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or endorsers: None.

E. ARCHIBALD VALENTINE.

438 SCHEDULE "E" (5).

Accommodation paper: None.

E. ARCHIBALD VALENTINE.

439 *Oath to Schedule "E."*

UNITED STATES OF AMERICA, *District of Illinois,* } ss:

On this 29th day of April, A. D. 1899, before me personally came E. Archibald Valentine, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his individual debts, in accordance with the acts of Congress relating to bankruptcy.

VICTOR M. HARDING,
Notary Public.

[NOTARIAL SEAL.]

440 SCHEDULE "F."

Statement of all the individual property of the bankrupt E. Archibald Valentine.

SCHEDULE "F" (1).

Real estate: None.

E. ARCHIBALD VALENTINE.

441 SCHEDULE "F" (2).

Personal property.

(a.) Cash on hand: None.
(b.) Bills of exchange, promissory notes, securities, etc.: None.
(c.) Stock in trade: None.
(d.) Household goods and furniture: None.

Wearing apparel: Two suits and two overcoats	$60
Jewelry, gold ring	20
Pearl pin	10
Miscellaneous wearing apparel	15

(e.) Goods or personal property of any other description: None.

E. ARCHIBALD VALENTINE.

442 SCHEDULE "F" (3).

Choses in action.

(a.) Debts due petitioner on open account: None.
(b.) Stocks in incorporated companies, negotiable bonds, etc.: None.
(c.) Policies of insurance: One insurance policy for $3,000, in the State Mutual Life Assurance Company of Worcester, Massachusetts, dated December 17th 1896, on the life of the petitioner, payable to his wife, Helen H. Valentine and upon her death prior to his to his estate.

This policy had a cash surrender value on December — 1898, of $55.98. The insurance company holds petitioner's notes for about $60. given for premium on said policy which are now due and unpaid.

(d.) Unliquidated claims of every nature: None.
(e.) Deposits of money in bank and elsewhere: None.

E. ARCHIBALD VALENTINE.

443 SCHEDULE "F" (4).

Property in reversion, in remainder, or in expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge: None.

E. ARCHIBALD VALENTINE.

444 SCHEDULE "F" (5).

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation, and, if any portion of it is real estate, its location, description, and present use.

Petitioner's wearing apparel as follows:

2 suits valued at	$30.
2 overcoats valued at	30.
Gold ring valued at	20.
Pearl pin valued at.....	10.
Other wearing apparel valued at.....	15.

The said property is at the abode of said petitioner, number 449 North State street, in the city of Chicago, county of Cook and State of Illinois, and is claimed to be exempt by virtue of the exemption laws of the State of Illinois, section 13, chapter 52, of the act on exemptions in the Revised Statutes of the State of Illinois.

E. ARCHIBALD VALENTINE.

445 SCHEDULE "F" (6).

Books, papers, deeds and writings relating to the bankrupt's business and estate: None.

E. ARCHIBALD VALENTINE.

446 *Oath to Schedule "F."*

UNITED STATES OF AMERICA, *District of Illinois*, } ss:

On this 29th day of April A. D. 1899, before me personally came E. Archibald Valentine, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his individual estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

VICTOR M. HARDING,
[NOTARIAL SEAL.] *Notary Public.*

Petition was filed in the clerk's office of the United States district court for the northern district of Illinois on April 29, 1899.

447 Mr. BURKE: I introduce in evidence the bill of complaint of Edwin A. Valentine against Richard C. Crawford, filed on

May 20th, 1895; I also offer in evidence the order appointing a receiver—a certified copy of the order appointing a receiver; I also offer in evidence the assignment of partnership assets of Crawford & Valentine to the receiver.

The COURT: I hear no objection. Let them go in.

Which said papers so introduced in evidence are in the words and figures following, to-wit:

448 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

To the honorable judges of said court, in chancery sitting:

Your orator, Edward A. Valentine of the city of Chicago, county and State aforesaid, respectfully represents unto your honors that on the 30th day of June A. D. 1894, your orator entered into an agreement with one Richard C. Crawford, of the same place, the defendant hereinafter named, to form a copartnership with him in the business of private bankers and brokers in the buying and selling on commission, and carrying on margins, of stocks and bonds, under the firm name of Crawford and Valentine, for the term of one year, upon the terms and conditions hereinafter stated, to-wit: That the said business should be carried on in the city of Chicago, and that the capital requisite for carrying on the same should be advanced by the said partners in equal shares; that your orator should contribute as his proportion of the same, a membership in the New York stock exchange, the value thereof to be ascertained by taking the difference between the present asking and selling price of the last membership sold, as recorded on the record books of said exchange, and that the said Crawford should contribute a sum of money equal to the value of the said membership, to be ascertained as aforesaid, putting in as part thereof the furniture and fixtures then in the place of business, which had been occupied by the said Crawford. It was further stipulated and agreed that said membership in the New York
449 stock exchange then in the name of your orator, should remain in him, and be held by him in trust, as assets of the partnership. It was further agreed that the said capital and all furniture and fixtures, and whatever might be purchased out of the partnership funds, as well as the gains and profits of the said business, should belong to, and the losses should be borne by, your orator and the said defendant, in equal shares, and if at any time thereafter additional capital should be required, the same should be advanced by the said parties to said agreement in equal shares, and any excessive capital brought in by either party should be considered a debt due to him from the partnership, and should bear interest at the rate of six per cent. (6%) per annum; that proper books of account should be kept of the said business, on the said premises,

in which all dealings and transactions should be entered, and each party should have free access thereto; that each party should be at liberty to draw not to exceed five hundred dollars ($500) monthly for his own private use on account, but not in excess of his presumptive share of the profits, so long only as the said business should be found profitable and permit such drawings without any impairment of said capital; that each partner should devote his whole time, skill and attention to the partnership business, and diligently and faithfully employ himself therein and carry on the same to the greatest advantage of the partnership, and neither partner should engage in any speculative trades for himself, or in the name of the firm; that neither partner should without the consent of the other, draw, accept or sign any bill of exchange, or promissory note, or contract any debt on account of the partnership, or employ
450 any of the moneys or effects thereof, or in any manner pledge the credit thereof except in the usual and regular course of business, nor without the consent of the other enter into any bond, or become surety for any person; that at the expiration of the partnership a statement should be made of its condition, and after payment of all debts the balance should belong to the said partners in equal shares, and be realized and divided accordingly.

Your orator further shows that the said partnership agreement was entered into verbally and subsequently reduced to writing, but was not in fact executed by either of the parties; that in pursuance however of said oral agreement the said parties commenced to carry on the business of private bankers and brokers, as contemplated in the said agreement, and have continued in said business up to the present time.

Your orator further shows that in violation of the terms and conditions of the said agreement, the said defendant Richard C. Crawford has engaged in outside speculations upon the board of trade, and elsewhere, to a very large extent, and has met and sustained serious losses in consequence thereof, and that he has also used the firm funds and drawn checks against its bank account for the purpose of meeting such losses, and in so doing he has not only withdrawn from the business of the said partnership the whole of his original contributions thereto as capital, amounting to about twenty-one thousand dollars ($21,000), but in addition a further sum of not less than twenty-five thousand dollars ($25,000) that in fact the said Crawford has withdrawn for his own use and exhausted more than the original capital invested in the business, and that on Saturday the 18th, inst., in order to cover losses so sustained by
451 him, in private speculation, he made a draft upon the New York correspondents of the firm for seventeen thousand, five hundred dollars ($17,500) and deposited the same in its bank in Chicago, most of which said sum included in said draft was to make good losses sustained by him in his own private speculations in which the firm had no interest.

Your orator further shows that the indebtedness of the said partnership of Crawford & Valentine, so far as he can now estimate the

same, amounts to about seventy thousand dollars ($70,000), if it does not exceed that amount; that its assets consist wholly of the membership in the New York stock exchange aforesaid, about sixty-five thousand dollars ($65,000) in outstanding accounts due to the said firm, of which forty thousand dollars ($40,000) is supposed to be worthless, and the said overdraft of the said Richard C. Crawford to said firm of about forty-six thousand dollars ($46,000), and also its office furniture and fixtures.

Your orator further shows that there is great danger that the New York membership in the stock exchange, which constitutes practically the greater portion of the valuable assets of said partnership may be attached at the suit of some creditor thereby preventing an equal distribution of the assets of said firm among all its creditors; that any delay in the action to be taken herein is likely to prove disastrous to the body of creditors; that your orator believes that it is for the manifest interest of such creditors that a *receiver* should be appointed forthwith to take immediate possession of all of the assets of said partnership, without waiting to serve process or give
452 notice to the defendant before making such appointment.

Forasmuch, therefore, as your orator is without adequate remedy in the premises, except in a court of equity, and to the end that the said Richard C. Crawford, who is made party defendant to this bill, may be required to make full and direct answer to the same, but not under oath, the answer under oath being waived; that the said copartnership may be dissolved and that an account may be taken of all and every of the copartnership dealings and transactions from the time of the commencement thereof, and also an account of the moneys received and paid by them, your orator and the defendant respectively, in regard thereto, and that the defendant may be decreed to pay to your orator, what if anything shall upon an accounting being taken be found to be due to him, your orator being ready and willing to, and hereby offering to pay what if anything shall upon taking said account appear to be due to the said defendant from him, and that a receiver may be forthwith appointed to take possession of the assets of said copartnership and convert the same into money, and out of the proceeds thereof to distribute the same ratably among the creditors of said copartnership, and that your orator may have such other and further relief in the premises as equity may require and to your honors shall seem meet.

That your honors grant a writ of summons in chancery, directed to the sheriff of said county of Cook, commanding him that he summont he defendant, Richard C. Crawford, to appear before said court on the first day of the next June term thereof, to be held at the court house, in the city of Chicago, in the county aforesaid, then
453 and there to answer this bill, etc.

(Signed) EDWARD A. VALENTINE.

FLOWER, SMITH & MUSGRAVE,
Compl't's Sol'c'rs.

STATE OF ILLINOIS, } ss:
County of Cook, }

On this twentieth day of May A. D. 1895, before me personally appeared the above named Edward A. Valentine, and made oath that he has heard read the above bill, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters he believes it to be true.

(Signed) EDWARD A. VALENTINE.

Subscribed and sworn to before me this 20th day of May A. D. 1895.

(Signed) STELLA W. TENNEY,
[SEAL.] *Notary Public.*

[Endorsed:] 7941 14304 Circuit ct. of Cook county Edward A. Valentine *vs.* Richard C. Crawford. Bill of complaint Copy Horton to file Filed May 20th 1895 Frank J. Gaulter clerk. Flower, Smith & Musgrave attorneys.

454 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County. In Chancery.

EDWARD A. VALENTINE, Complainant, }
v.
RICHARD C. CRAWFORD, Defendant. }

On reading and filing the bill of complaint in the above entitled cause, duly verified, and on motion of Flower, Smith & Musgrave, solicitors for the said complainant;

It is by the court ordered that the Chicago Title and Trust Company be, and *he* is hereby, appointed as receiver of all of the partnership assets and effects of the firm of Crawford and Valentine, in this cause, upon giving bond as such receiver with satisfactory security in the sum of — thousand dollars, and the said receiver is hereby authorized and instructed to take immediate possession of the said partnership assets, together with the books of account, and to hold and convert the same under the order and direction of this court; and leave is hereby given to said receiver to apply to the court from time to time for such instructions in respect to said estate as he may deem advisable or necessary.

Entered May 20, 1895.

I consent to appointment of the receiver according to above order.

(Signed) EDW. O. BROWN, *For Def't.*

[Endorsed:] Circuit court of Cook county Edward A. Valentine *vs.* Richard C. Crawford. Order of complaint.

455 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County. In Chancery.

EDWARD A. VALENTINE, Complainant,
v.
RICHARD C. CRAWFORD, Defendant.

Whereas on the 20th day of May, 1895, an order was entered by said court appointing the Chicago Title & Trust Company, an Illinois corporation, receiver of all the partnership assets and effects of the firm of Crawford & Valentine, and said receiver was authorized and instructed to take immediate possession of said partnership assets, together with the books of account, and to hold and convert the same under the order and direction of said court;

Now therefore, know all men by these presents: That we, said Richard C. Crawford, and said Edward A. Valentine, copartners under the firm name of Crawford & Valentine, for and in consideration of the sum of one dollar to us in hand paid, and in pursuance of the said order of said court, have granted, bargained, sold, assigned and delivered, and by these presents do grant, bargain, sell, assign and deliver unto the said Chicago Title & Trust Company, receiver as aforesaid, all our partnership goods, chattels, property, assets, effects, bills and accounts receivable, choses in action, and debts due to us, copartners as aforesaid, including all stocks or bonds which we own or in which we have any interest, and memberships in the New York or Chicago stock exchange, belonging to us,
456 whether standing in the name of said copartnership or either member thereof

To have and to hold said goods, chattels, property, assets and effects unto the said Chicago Title & Trust Company, receiver, its successors and assigns, for the purpose aforesaid.

In witness whereof we have hereunto set our hands and seals the 20th day of May, 1895.

(Signed) EDWARD A. VALENTINE. [SEAL.]
RICHARD C. CRAWFORD. [SEAL.]

[Endorsed:] On circuit court of Cook county Edward A. Valentine *vs.* Richard C. Crawford Assignment of partnership assets to receiver.

457 Plaintiff here rested.

Thereupon the defendants to maintain the issues on their parts, introduced the following evidence, to-wit:

RICHARD C. CRAWFORD, one of the defendants called as a witness in his own behalf, being first duly sworn, was examined in chief by Mr. Brown and testified as follows:

Q. What is your name?
A. Richard C. Crawford.
Q. You were a member of the firm of Crawford & Valentine in 1895?
A. Yes sir.
Q. You have before you the ledger of Crawford & Valentine?
A. Yes sir.
Q. Are you familiar with the ledger?
A. Yes sir.
Q. Were you familiar with it, and of the account books of Crawford & Valentine up to the 20th of May 1895?
A. Yes sir.
Q. Will you turn to the account which is in that ledger under the name of James R. Watkins?
A. Yes sir.
Q. Did you know how that account stood upon the 20th of May 1895 when that book passed out of the possession of Crawford & Valentine into the hands of the receiver?
458 A. Yes sir.
Q. How did it stand?
A. Joseph R. Wilkins.
Q. When did you first know it had been changed to James R. Watkins or whatever it is now?
A. I think it was during the proceedings in bankruptcy.

Mr. MORAN: What is the object of this?
Mr. BROWN: To rebut the presumption of fraud that Mr. Burke tried to make concerning these books and these accounts. He put Mr Boyd specially on to testify that the account was changed before it came into his hands.
Mr. MORAN: I know, but you can't put in any defense on that question.
Mr. BROWN: That may be, but I can contradict that evidence.
Mr. MORAN: I don't think so. Do you offer it for the purpose of rebutting fraudulent intent? If so it is not competent.
The COURT: I don't see that that account has much to do with this case, only wasting a good deal of time.

Mr. BROWN:

Q. Mr. Crawford do you know the plaintiff, Mr. Burke?
A. Yes sir.
Q. How long did he deal with the firm of Crawford & Valentine?
A. He dealt with us from the time we started in business on July 1st, more or less all the time until we failed.
459 Q. From July 1st 1894 to the time of the failure in 1895?
A. Yes, sir.

Q. Do you recollect the conversation with Mr. Burke in the latter part of October, at your place of business, in 1894?

A. Well, I have had a great many conversations with Mr. Burke.

Q. Well, this was in the latter part of October, or the first of November, I am calling your attention to?

A. I talked to Mr. Burke while he was in our office almost every day while we were in business.

Q. Do you remember the conversation concerning the Metropolitan Traction stock and your relation to it?

A. Yes sir.

Q. Shortly after your return from Philadelphia?

A. Yes sir.

Q. When was that?

A. That was in the fall of 1894, October or November.

Q. What was it?

Mr. MORAN: I object.

The COURT: Upon what theory are you calling for this conversation?

Mr. BROWN: We offer to prove by Mr. Crawford that he told Mr. Burke at that time that he had sold Metropolitan Traction short at Philadelphia. This shows Mr. Burke must have known,
460 from the natural and inevitable course of the business that Crawford & Valentine were interested to that extent—that he was short—this number of shares of the Metropolitan Traction stock.

The COURT: Under what plea is that offered?

Mr. BROWN: Our position in relation to this matter is this: This bankruptcy discharge we contend is perfectly good against anything that is alleged and can be proved under that declaration; but these gentlemen have assumed the burden of proving a case under the declaration. Now if your honor should hold that the bankruptcy discharge was good as against a certain case and not as against another, your honor must consider what sort of a case they have made. This evidence would then be competent and relevant as to whether upon the very question as to whether the bankruptcy discharge was good. If your honor should hold for instance—contrary to our contention—that a debt made by fraud not in a fiduciary capacity, but a fraudulent contract, was not barred even if it had not been reduced to judgment, then any evidence which we put in in reply to that which goes to show that the debt was not fraudulently contracted would be competent under this bankruptcy issue.

The COURT: As I understand the pleadings in this case now, you have only two things to do: Move at the close of their case, and it is a motion in reference to the evidence, or introduce a certified copy of the discharge in evidence.

461 Mr. BROWN: Your honor holds we cannot introduce evidence? If we offer to show that this debt was not fraudulent contracted, does your honor hold that we can't prove it?

The COURT: Yes.

Mr. BROWN: All we want is to save our point. I don't care to wrangle about it. We will withdraw Mr. Crawford.

The COURT: Very well.

To which ruling of the court the defendants by their counsel then and there duly excepted.

The COURT: That is my view, but I have got serious doubts, Judge Moran, as to whether or not you have proved any damages here.

Mr. PENCE: There is no question about that. The rule in this State is as to the measure of damages, the value of the stock at the time of this conversion.

The COURT: And not at the time of the demand.

Mr. BURKE: Then it is shown your honor what would be due the plaintiff in this case on the 20th of May 1895 if he had been credited with the market value of the stock.

The COURT: I understand.

Mr. PENCE: That is the rule in this State.

The COURT: It is not my view of the law.

Mr. PENCE: It is the rule of this State in regard to stocks.

Mr. BROWN: I would like to be sure and get this offer right:

462 We have asked a question of Mr. Crawford which has been objected to. Counsel for defendants states he offers this for the purpose of showing the debt was not fraudulently contracted, and the court sustains the objection upon the ground that we cannot introduce the evidence under the pleadings as they exist, to which the defendants except.

The COURT: Yes.

To which ruling of the court the defendants by their counsel then and there duly excepted.

Mr. VROOMAN: We offer petition in discharge of bankruptcy, the certificate of the discharge in bankruptcy of the defendants herein, and both of them, in the United States district court, northern district of Illinois, north division, dated April 5th 1900, and the certificate being dated April 10th 1900, marked "Defendants' Exhibit 1."

Which said papers so introduced are in the words and figures following, to-wit:

463 In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

Present: The Honorable Christian C. Kohlsaat, judge.

Whereas, Richard C. Crawford and E. Archibald Valentine, individually and as co-partners under the firm name and style of Crawford and Valentine of Chicago, in said district, have been duly adjudged bankrupts under the acts of Congress relating to bankruptcy, and appear to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Richard C. Crawford and E. Archibald Valentine, individually and as co-part-

ners under the firm name and style of Crawford and Valentine, be discharged from all debts and claims which are made provable by said acts against their individual and copartnership estates, and which existed on the 29th day of April, A. D. 1899, on which day the petition for adjudication was filed by them; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

I, T. C. MacMillan, clerk of the district court, of the United States of America for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order of discharge entered of record in said court on the 5th day of April, A. D. 1900, in the above entitled cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 10th day of April, A. D. 1900.

[SEAL.] T. C. MACMILLAN, *Clerk.*

464 Mr. BROWN: We propose to prove by Mr. Valentine and Mr. Crawford that they both considered the accounts which have been put in as worthless—that they regarded them as valuable assets of their firm.

The COURT: Regarded them as valuable?

Mr. BROWN: Regarded them as valuable up to very near the time of the failure.

Mr. MORAN: We object.

The COURT: Objection sustained.

To which ruling of the court defendants by their counsel then and there duly excepted.

JOHN E. BURKE, recalled on behalf of the defendants was examined by Mr. Brown and testified as follows:

Q. Mr. Burke, did you know of the fact that the defendants were in bankruptcy when the bankruptcy proceedings were pending in the northern district of Illinois, northern division, the United States district court?

A. Yes sir, I knew it.

Q. You were scheduled as a creditor in those proceedings were you?

A. The schedule——

Q. You were scheduled?

465 A. My name is in the schedule for certain amount.

Q. As a creditor?

A. As a creditor.

Q. You had notice of those proceedings did you in the due course of the bankruptcy matter?

A. Oh yes, I knew it.

Q. And you were present at the meetings of the creditors?

A. I was present at one meeting of the creditors.

Q. You were also present at the time the defendants in this case

applied for their discharge in bankruptcy in the United States court, were you?

A. I was.

Q. During the proceedings pending the discharge?

A. I knew of the proceedings.

Q. You were there?

A. I don't know I was there when they made their application for discharge, but I knew——

Q. You objected to their discharge?

A. Not for myself.

Q. For somebody else?

A. As attorney for another creditor I objected.

Q. And you were present many times in court introducing evidence and examining witnesses?

A. I was before the referee several times in contesting their discharge for one of the creditors, as attorney for one of the creditors.

Q. And you had ample time to prove your claim in bankruptcy had you see- fit to do so?

A. I had time to prove my claim if I thought it possible; I didn't so regard it.

Q. I didn't ask you that. I asked you if you had the time
466 and opportunity to prove your debt?

Mr. MORAN: Oh yes he had plenty of time.

A. Oh yes, plenty of time.

Cross examination.

By Mr. PEECH:

Q. You didn't prove your claim?

A. No sir.

Q. Or attempt to prove it?

A. No sir.

And thereupon the court adjourned to meet at 2 o'clock p. m.

467

BURKE
vs.
CRAWFORD ET AL.

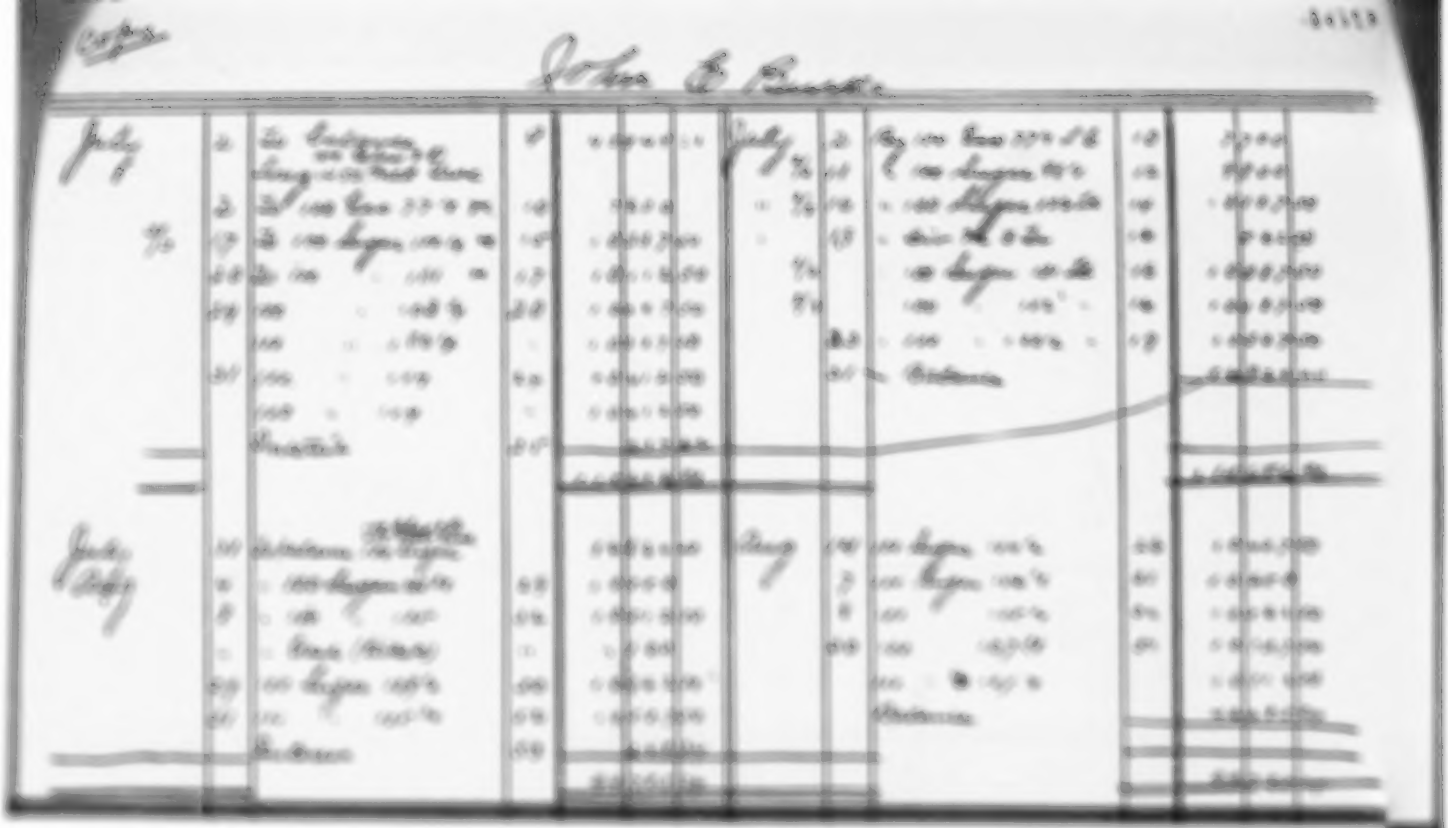
TUESDAY, 10 A. M., January 9, 1883.

Court met pursuant to adjournment.

Mr. BURKE: May it please the court, I desire in my own behalf to withdraw the objections that were made yesterday to Mr Crawford's testimony. I desire to withdraw the objections.

Mr. BROWN: It is too late.

The COURT: The case is closed.



Copy

John E Burke

July	2	To balance 100 Ohio & 100 Long 450 Met Trac	9	4 5 7 4 4	20	July	2	By 100 Gas 77½	26	10	7 7 0 0
							3/3	" 100 Sugar 98½	11	12	9 8 0 0
	2	To 100 Gas 77½	10	7 8 0 0			3/3	" 100 Sugar 102 Ex	16	14	10 2 8 7 50
3/3	17	To 100 Sugar 100¼	15	10 3 3 7 50				" Dir 2 & Ex	18	16	5 6 2 50
	20	To 100 " 101	17	10 4 1 2 50			3/3	" 100 Sugar 101 Ex	18	16	10 4 8 7 50
	24	100 " 103¾	20	10 6 8 7 50			5/3	" 100 " 102	18	16	10 4 8 7 50
		100 " 103¼		10 6 3 7 50				23 " 100 " 103½	19	19	10 8 3 7 50
	31	100 " 107	24	11 0 4 1 2 50				31 Balance			56 8 2 4 40
		100 " 107		11 0 4 1 2 50							
		Interest	25	2 3 7 6 2							
				115 6 8 6 90							115 6 8 6 90
July	31	To balance 100 Sugar 100 Ohio & 350 Met Trac		56 8 2 4 40		Aug	1st	100 Sugar 104½	26		10 4 3 7 50
Aug	4	" 100 Sugar 105 38	29	10 5 5 0			7	100 Sugar 106 38	31		10 6 5 0
	8	" 100 " 105	32	10 5 1 2 50			8	100 " 105	32		10 5 6 2 50
	"	" Cash (ticket)	"	100			30	100 " 107 38	51		10 7 3 7 50
	29	100 Sugar 109½	50	10 9 6 2 50				100 " " 101			10 7 1 2 50
	31	100 " 105 34	52	10 5 8 7 50				Balance			46 8 5 24
		Interest	53	2 4 8 34							
				99 7 8 5 24							99 7 8 5 24
Aug	31	Balance 100 C & Ohio 450 Met Trac		46 6 5 3 24		Sept	6	100 Sugar 105 38	57		10 5 5 0
Sept	6	100 Sugar 105¼	57	10 5 3 7 50			6	100 " 104	57		10 3 5 7 50
	"	100 " 103 38		10 3 5 0			15	200 Reading 21 ⅛	65		20 8 7 50
	17	200½ Reading 19	66	19 1 2 50			17	200 " 19 38			19 2 5 -
	18	200½ " 19		20 0 0							22 6 0 9 14
	28	50 Met Trac 16½	76	5 3 1 25							
Oct	1	Interest - Sept a/c	79	2 4 2 70							
				77 5 5 9 14							77 5 5 9 14
Sept	29	Balance		52 6 0 9 14		Oct	2	Dir 500 Met Trac	81		6 25
Oct	5	100 Sugar 84 34	87	8 4 8 7 50			4	100 Sugar 85	84		8 5 1 2 50
	31	Interest - Oct a/c	107	2 6 8 69			31	Balance			52 2 2 7 88
				61 3 6 5 33							61 3 6 5 33
Oct	31	Balance 500 Met Trac 100 C & Ohio		52 2 2 7 88		Nov	16	100 Sugar 85 78	122		8 5 0 0
Nov	15	100 Sugar 87½	121	8 7 6 2 50			24	100 Sugar 87 78	124		8 7 7 5 -
	23	100 " 87½	125	8 7 6 2 50				Balance			70 2 4 4 1 83
	30	Interest -	133	2 6 3 84 -							
				70 0 1 6 83							70 0 1 6 83
Nov	30	Balance 500 Met Trac 100 C & Ohio	555	70 2 4 4 1 83		Nov	30	Bal fwd to folio 585			70 2 4 4 1 83

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5-83-

470

John E Burke from folio 526

Nov	30	Balance Long 500 Met Trac. 100 B+Ohio		52	44	83	Dec	20	Cy	451	2	000	
Dec	31	Dec Int	161		267	28			Balance fwd		50	709	11
				52	709	11					52	709	11
Dec	31	Balance fwd		50	709	11	Jan	11	Check		2	000	
		100 Erie + Ohio on hand	240					17	Div 1/2 500 Met Trac			625	
		500 Met-Trac "						25	Check		2	000	
Jan	29	300 " " Jan + Co		24	000			28	300 Met-Trac	908	27	000	
	31	Int			205	06		29	Check		1	900	
								31	Balance		43	289	17
				74	914	17					74	914	17
Jan	31	Balance fwd		42	289	17	Feby	28	Balance		42	453	62
		500 Met Trac on hand											
Feby	28	Interest			164	45							
				42	453	62					42	453	62
Feby	28	Balance		42	453	62	Mar	5	1/2 Pfd 10 May Whit-			6	25
		500 Met-Trac on hand						30	Balance fwd		47	288	00
Mar	28	50 " " " "	93	4	656	25							
		Int for Mch			184	68							
				47	294	93					47	294	93
Apl	1	Balance fwd		47	288	00	Apl	1	100 O+O	179	1	762	50
		550 Met on hand							Check Wm Kent		3	900	
		100 O+O							" Jamieson + Co			500	
	30	Interest			207	98		16	Div 550 Met-Trac			687	50
								30	Balance fwd		41	246	28
				47	496	28					47	496	28
Apl	30	Balance fwd		41	246	28	May	21	550 Met-Trac	95	52	181	25
		550 Met-Trac on hand											
May	13	Ck Wm Kent		3	023	69							
	21	Interest to date			148	78							
		Balance fwd		7	462	54							
				52	181	25					52	181	25
							May	21	Balance		7	462	54

Copy.

Dick Bros & Co

Philadelphia Pa

July	18	Dividend Met-Tr	10		562	50	July	21	By Balance	9	48	290	47
	31	Balance			47727	97		"	Long 450 Met-Tr				
					48290	47				10	48	290	47
Aug	31	To balance			49659	32							
							July	31	By balance		47	724	97
							Aug	6	" Interest July	90		165	40
								25	" 5 Met-Trac	118 47		590	31
								31	" 110 " "	117½ 52		1179	63
					49659	32					49	659	32
Sep	1	15 Met-Trac Dft					Aug	31	Balance 15 Met-Trac		49	659	32
	6	Draft	57				Sep	7	Interest-Augus 30	58		144	56
	10	10 Met-Trac Dft	60					10	10 Met-Trac	118 60		1180	62
	14	Draft	64		1000			28	50 " "	116½ 76		5824	13
		Balance			54812	64					56	812	64
					56812	64							
Oct	2	Dividend 500 Met-Trac	81		625		Sep	29	Balance 500 Met-Trac		54	812	64
	12	200 Peoples Trac	91		10987	50	Oct	20	50 Peoples	98		2678	12
	16	200 " "	94		10887	50		29	100 Met-Trac	105		10206	25
		DB&L			4000								
	24	100 Met-Trac	101		10918	75							
		Balance			31028	26							
					68397	01					68	397	01
Oct	29	Bal Dft 350 Peoples Trac					Oct	29	Balance 500 Met-Trac		31	028	26
Dec	20	D B & L	151		3000		Dec	17	200 Peoples	94 148	10	812	50
	31	Balance			48917	68		18	50 "	94 149	2	703	12
								19	100 "	92¾ 150	9	281	25
								26	D B & L	155	1	500	
									Int Dept ac	"		142	60
									" Oct ac	"		152	94
									" Mar "	"		147	21
								31	" Dec "			144	70
					51917	54					51	917	54
Jany	10	200 Met-Trac 100¾			20137	50							
	11	200 " " 101½			20287	50	Dec	31	Balance 500 Met-Trac		48	917	54
	16	Div 1¼ 500 Met-Trac			625		Jan	12	Cash D B & L		1	200	
	26	50 Met-Trac	944		4709	87	"	25	150 Met-Trac	98	14	709	87
		50 " " 218 Rec			4700				150 " "	97	14	559	38
		Draft			4000				50 " "	96	4	803	10
	28	300 Met-Trac	904		27018	75			Cash for dup RCC			127	50
	31	Balance Jud			3838	37		28	Rec " 1034		1	500	
					85816	66					85	816	66
Feby	4	50 Met-Trac	100		4456	58		31	Bal Jud			4338	07
	28	Balance 6 pays 412			4891	95		4	50 Met-Trac	74	4	753	12
								9	Int Jan			97	17
					9384	80					9	384	80

412

Copy

Dick Bros & Co
Philadelphia Pa

Mar	12	Error in Jan Int				20		Febry	28	Balance fwd from	411		4	391	95
"	13	50 Met Traction	96¾		4	834	38	Mar	13	Int February				11	43
	30	Draft-				500			28	50 Mc Trac	93		4	058	12
		Balance			8	330	25			50 " "	92½		4	628	13
					13	684	63						13	017	63
Apl	3	Draft-				1000		Mar	30	Balance fwd			8	930	25
	16	100 Met-Trac-	89½		8	943	75	Apl	4	Interest-Mch				7	84
										Draft-			1	500	
									30	Balance fwd				230	66
					10	068	75						10	068	75
Apl	30	Balance fwd				230	66	May	2	Int April				13	46
									21	Balance fwd			21	720	
						230	66						230	66	
May	21	Balance			21	720									

Toland Bros. & Co. account, page 416 of the ledger, page 461 of the record.

This account is also here printed in full as follows:

416

Copy

Toland Bros. Coal Co.

Philadelphia Pa

Sept	24	2 Penna Ry 9738	72		103	13	Oct	5	Check 101 13 Jan 20	85		103	13
Jan	16	120 West Che Recd			- - -	- -	Jan	16	120 W C	716	1	8	90 5
Jan	17	Draft-		1	8	90 5		17	25- Phil Traction	924	2	30	4 68
	18	25- Phil Traction	905	2	25	7 81		26	50 West Traction	926		47	0 0
	23	Check			46	87		29	50 " "	924		46	0 9 28
	26	50 Met- Trac	944		47	0 9 38		29	Check.				9 38
	31	Balance fwd		3	8	2 4 0 63		29	300 Met-Trac Hagerstown	926	2	4	0 0 0
								31	100 " "	961		9	6 3 1 25
				5	9	1 5 9 64					5	9	1 5 9 64
Feb	4	100 Met-Trac 1004		1	0	0 1 8 75	Jan	31	Balance fwd		3	8	2 4 0 63
	28	Balance		3	0	7 2 1 88	Feb	2	Draft-			2	5 0 0
				4	0	7 4 0 63					4	0	7 4 0 63
Mar	13	353 Met- Trac 984		3	3	8 4 0 62	Feby	28	Balance fwd		3	0	7 2 1 88
	27	Check			3	2 86	Mar	4	Int for Feby				10 10
	30	Balance fwd				01		15	Draft			3	0 0 0
								18	Int Mar 15				4 53
				3	3	8 7 3 51					3	3	8 7 3 51
Apl	4	Bal & Int a/c				01	Mar	30	Balance				01

Mr. BROWN: Crawford is not here.

Mr. BURKE: Yes, he is.

Mr. BROWN: I didn't understand what the court said.

The COURT: Mr. Burke says that he personally desires to withdraw his objections to the testimony of Mr. Crawford. I don't know whether his counsel agree with him or not.

Mr. PENCE: Oh, he is counsel in the case.

The COURT: Well, what have you got to say, gentlemen? The case is closed unless you make application to put Mr. Crawford on the stand again.

Mr. BROWN: I do not think I have anything to say.

The COURT: Well, the case is closed. They are silent. Proceed, Mr. Pence.

468 Mr. BURKE: I further now, in my own behalf, further withdraw the objections to the testimony which they proposed to offer and would like to have their response to that.

The COURT: It appears they haven't anything to say. Proceed, Mr. Pence.

Mr. Pence then proceeded with his argument on behalf of the plaintiff.

10 A. M., JANUARY 10, 1901.

It was agreed by and between counsel that the Financial Chronicle should be considered in evidence as to the market prices of Metropolitan Traction stock at such dates as the court should desire to inspect the same.

The page of accounts in ledger and cash book of Crawford & Vallentine hereinbefore mentioned as offered in evidence here follows:

(Here follow fac-similes marked pp. 469, 470, 546, 547, and 548.)

568 Which was all the evidence introduced or offered in the party to said cause in behalf of the plaintiff or on behalf of the defendants.

Whereupon the plaintiff asked the court as follows, to hold certain propositions of law in said cause.

STATE OF ILLINOIS, } ss.:
County of Cook, }

In the Circuit Court of Cook County.

JOHN E. BUSEE
vs.
RICHARD C. CRAWFORD and EDWARD A. VAUGHAN. } Gen. No. 17038. Term No. 756.

The plaintiff, by his attorneys, submits the following propositions, and asks that the same may be held as law in the decision of the above entitled cause.

A. M. PENCE,
T. A. MORAN,
Attorneys for Plaintiff.

1. If the evidence shows that the defendants were acting as brokers and agents of the plaintiff, and that on or about the 24th day of October, 1894, the defendants, as such brokers and agents were carrying for him, and had in their possession, or under their control, for the plaintiff, and belonging to him, five hundred shares of Metropolitan Traction stock, in controversy in this case; and that on or about the 24th day of October, 1894, the defendants, without the knowledge or consent of the plaintiff, sold, or caused to be sold, one hundred shares of said stock, and converted, or appropriated to their own use, the said one hundred shares, or the proceeds of the sale thereof, or the plaintiff's pecuniary interest in said one hundred shares, or his interest in said proceeds, and that such sale, conversion, or appropriation was made with the intent to commit upon the plaintiff a positive fraud, involving intentional wrong, then the court holds that the defendant's conduct was such that under Gentsinger vs. Smith, supra, is not a legal defense to the plaintiff's claim for such damages, if any, as he may be entitled to by reason of such sale, conversion or appropriation. *Held.*

2. If the evidence shows that the defendants were acting as brokers and agents of the plaintiff, and that on or about the 26th day of January, 1895, the defendants, as such brokers and agents were carrying for him, and had in their possession, or under their control, for the plaintiff, and belonging to him, five hundred shares of Metropolitan Traction stock, in controversy in this case; and that on or about the said 26th day of January, 1895, the said

sale, without the knowledge or consent of the plaintiff sold or caused to be sold, one hundred shares of said stock converted or appropriated to their own use the said one hundred shares or the proceeds of the sale thereof, or the plaintiff's interest thereon and one hundred shares, or the interest in said proceeds, and that such sale, conversion or appropriation was made with the intent to commit upon the plaintiff a positive fraud, involving intentional wrong, then the court holds that the defendants' conduct was such that their discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, he may have sustained by reason of such sale, conversion or appropriation. *Held*,

3. If the evidence shows that the defendants were acting as the brokers and agents of the plaintiff, and that on or about the [illegible] day of January, 1905, the defendants, as such brokers and agents, were carrying for him, and had in their possession or under their control, for the plaintiff and belonging to him, three hundred
(1) shares of Metropolitan Traction stock, in controversy in this case; and that on or about the said [illegible] day of January, 1905, the defendants, without the knowledge or consent of the plaintiff, sold, or caused to be sold, two hundred shares of said stock, and converted, or appropriated to their own use, the said two hundred shares or the proceeds of the sale thereof, or the plaintiff's interest in said two hundred shares, or his interest in said proceeds, and that such sale, conversion, or appropriation was made with the intent to commit upon the plaintiff a positive fraud, involving intentional wrong, then the court holds that the defendants' conduct was such that their discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, he may have sustained by reason of such sale, conversion or appropriation. *Held*,

4. If the evidence shows that the defendants were acting as the brokers and agents of the plaintiff, and that on the [illegible] day of January, 1905, the plaintiff or the special [illegible] and [illegible] of the defendants, placed, or caused to be placed, in their hands, or under their control, three hundred shares of the capital stock of the Metropolitan Traction Company, to be held and carried for him by defendants as his brokers, agents and pledgees, and that at the time said three hundred shares of stock were placed in the hands or under the control of the defendants as aforesaid, the defendants advanced, or caused to be advanced, to or for the plaintiff the sum of twenty-four thousand dollars as a loan on said shares of stock, and that on or about the [illegible] day of March, 1905, the defendants, without the knowledge or consent of the plaintiff and or caused to be sold the said three hundred shares of said stock and converted or appropriated to their own use, the said shares of stock or the proceeds of the sale thereof, or the plaintiff's investment thereon or said shares, or his interest in said proceeds, and that such sale, conversion or appropriation was made with the intent to commit upon
(2) the plaintiff a positive fraud, involving intentional wrong, then the court holds that the defendants' conduct was such that their discharge in bankruptcy is not a legal defense to

the plaintiff's claim for such damages, if any, as he may have sustained by reason of such sale, conversion or appropriation. *Held.*

5. If the evidence shows that the defendants were acting as the brokers and agents of the plaintiff, and that on or about the 16th day of April, 1895, the defendants, as such brokers and agents, were carrying for him, and had in their possession, or under their control, for the plaintiff, and belonging to him, fifty shares of Metropolitan Traction stock, in controversy in this cause; and that on or about the said 16th day of April, 1895, the defendants, without the knowledge or consent of the plaintiff, sold, or caused to be sold, the said fifty shares of stock, and converted, or appropriated to their own use, the said fifty shares, or the proceeds of the sale thereof, or the plaintiff's reversionary interest in said fifty shares, or his interest in said proceeds and that such sale, conversion or appropriation was made with the intent to commit upon the plaintiff a positive fraud, involving intentional wrong, then the court holds that the defendants' conduct was such that their discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of such sale, conversion or appropriation. *Held.*

6. If the evidence shows that on or about the 20th day of December, 1894, the defendants falsely and fraudulently represented to the plaintiff that, as his brokers and agents, they then had on hand, or were then carrying five hundred shares of Metropolitan Traction stock belonging to him, and that it was then necessary for the plaintiff to pay to or deposit with them the sum of two thousand dollars, as further margins or security on said five hundred shares of stock; and that the defendants then required the plaintiff to pay to or deposit with them the sum of two thousand dollars as fur-
572 ther margins or security on said five hundred shares of stock, as aforesaid; and if the evidence further shows that the plaintiff relied upon said representations, and believed them to be true, and was thereby induced to pay, and did pay to and deposit with the defendants, at the time above mentioned, the sum of two thousand dollars, as further margins and security on said five hundred shares of Metropolitan Traction stock; and if the evidence further shows that the aforesaid representations, if such representations were made, were false, and were known by the defendants to be false when they made them, if they did make them; and that, instead of five hundred shares, the defendants then held or carried or had on hand for the plaintiff, and belonging to him, only four hundred shares of Metropolitan Traction stock, and that said representations, if made, were made with intent to defraud the plaintiff, and to obtain from him the said sum of two thousand dollars, then the court holds that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of said representations, if such representations were made. *Held.*

7. If the evidence shows that on or about the 11th day of January, 1895, the defendants falsely and fraudulently represented to the

plaintiff that, as his brokers and agents, they then had on hand, or were then carrying, five hundred shares of Metropolitan Traction stock belonging to him, and that it was then necessary for the plaintiff to pay to or deposit with them the sum of two thousand dollars, as further margins or security on said five hundred shares of stock; and that the defendants then required the plaintiff to pay to or deposit with them the sum of two thousand dollars as further margins or security on said five hundred shares of stock, as aforesaid; and if the evidence further shows that the plaintiff relied upon said representations, and believed them to be true, and was thereby induced to pay, and did pay, to and deposit with the defendants, at the time above mentioned, the
573 sum of two thousand dollars, as further margins and security on said five hundred shares of Metropolitan Traction stock; and if the evidence further shows that the aforesaid representations, if such representations were made, were false, and were known by the defendants to be false when they made them, if they did make them, and that, instead of five hundred shares, the defendants then held or carried, or had on hand for the plaintiff, and belonging to him, only three hundred shares of Metropolitan Traction stock; and that said representations, if made, were made with intent to defraud the plaintiff, and to obtain from him the said sum of two thousand dollars, then the court holds that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of said representations, if such representations were made. *Held.*

8. If the evidence shows that on or about the 25th day of January, 1895, the defendants falsely and fraudulently represented to the plaintiff that, as his brokers and agents, they then had on hand, or were then carrying, five hundred shares of Metropolitan Traction stock belonging to him, and that it was then necessary for the plaintiff to pay to or deposit with them the sum of two thousand dollars, as further margins or security on said five hundred shares of stock; and that the defendants then required the plaintiff to pay to or deposit with them the sum of two thousand dollars as further margins or security on said five hundred shares of stock, as aforesaid; and if the evidence further shows that the plaintiff relied upon said representations, and believed them to be true, and was thereby induced to pay, and did pay to and deposit with the defendants, at the time above mentioned, the sum of two thousand dollars, as further margins and security on said five hundred shares of Metropolitan Traction stock; and if the evidence further shows that the aforesaid representations, if such representations
574 were made, were false, and were known by the defendants to be false when they made them, if they did make them, and that, instead of five hundred shares, the defendants then held or carried, or had on hand for the plaintiff, and belonging to him, only one hundred shares of Metropolitan Traction stock; and that said representations, if made, were made with intent to defraud the plaintiff, and to obtain from him the said sum of two thousand dol-

lars, then the court holds that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of said representations, if such representations were made. *Held.*

9. If the evidence shows that on or about the 29th day of January, 1895, the defendants falsely and fraudulently represented to the plaintiff that, as his brokers and agents, they then had on hand, or were then carrying, two hundred shares of Metropolitan Traction stock belonging to him, and that it was then necessary for the plaintiff to pay to or deposit with them the sum of one thousand dollars, as further margins or security on said two hundred shares of stock; and that the defendants then required the plaintiff to pay to or deposit with them the sum of one thousand dollars as further margins or security on said two hundred shares of stock as aforesaid; and if the evidence further shows that the plaintiff relied upon said representations, and believed them to be true, and was thereby induced to pay, and did pay, to and deposit with the defendants, at the time above mentioned, the sum of one thousand dollars, as further margins and security on said two hundred shares of Metropolitan Traction stock; and if the evidence further shows that the aforesaid representations, if such representations were made, were false, and were known by the defendants to be false when they made them, if they did make them, and that, at the time said representations were made by the defendants, if said representations
575 were made by them, they did not then hold, carry or have on hand for the plaintiff and belonging to him, any shares of Metropolitan Traction stock whatever; and that said representations, if made, were made with intent to defraud the plaintiff, and to obtain from him the said sum of one thousand dollars, then the court holds that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of said representations, if such representations were made. *Held.*

10. If the evidence shows that on or about the 1st day of April, 1895, the defendants falsely and fraudulently represented to the plaintiff that, as his brokers and agents, they then had on hand, or were then carrying, five hundred and fifty shares of Metropolitan Traction stock belonging to him, and that it was then necessary for the plaintiff to pay to or deposit with them the sum of three thousand eight hundred dollars, as further margins or security on said five hundred and fifty shares of stock; and that the defendants then required the plaintiff to pay to or deposit with them the sum of two thousand eight hundred dollars as further margins or security on said five hundred and fifty shares of stock, as aforesaid; and if the evidence further shows that the plaintiff relied upon the said representations, and believed them to be true, and was thereby induced to pay, and did pay, to and deposit with the defendants, at the time above mentioned, the sum of three thousand eight hundred dollars as further margins and security on said five hundred and fifty shares of Metropolitan Traction stock; and if the evidence

further shows that the aforesaid representations, if such representations were made, were false, and were known by the defendants to be false when they made them, if they did make them, and that, at the time said representations were made by the defendants, if said representations were made by them, they then held, carried, or had on hand for the plaintiff and belonging to him, only fifty
576 shares of Metropolitan Traction stock; and that said representations, if made, were made with intent to defraud the plaintiff, and to obtain from him the said sum of three thousand eight hundred dollars, then the court holds that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of said representations, if such representations were made. *Held.*

11. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the first count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said first count. *Held.*

12. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the second count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said second count. *Held.*

13. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the third count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defence to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said third count. *Held.*

14. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the fourth count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defence to
577 the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said fourth count. *Held.*

15. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the fifth count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said fifth count. *Held.*

16. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the sixth count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said sixth count. *Held.*

17. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the seventh count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said seventh count. *Held.*

18. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the eighth count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said eighth count. *Held.*

19. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the ninth count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defense
578 to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said ninth count. *Held.*

20. The court holds, as a matter of law, that all the material allegations of matter of fact contained in the tenth count of the plaintiff's declaration stand as admitted on the pleadings, and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said tenth count. *Held.*

All of which twenty propositions of law thus submitted by the plaintiff were "held," and marked "held" by the court, to which holding of each and every one of said propositions, and of all of the same, the defendants then and there duly excepted, and entered their exceptions herein.

And the defendants asked the court as follows, to hold certain propositions of law in said cause.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

JOHN E. BURKE
vs.
RICHARD CRAWFORD and EDWARD A. VALENTINE.

And the said defendants request the court to hold the following propositions of law:

1. The court holds, as matter of law, that the discharge in bankruptcy of the defendants is a bar to the plaintiff's cause of action as set out in the first five counts of his declaration. *Refused.*

579 2. The court holds, as matter of law, that under the evidence in this case, the discharge in bankruptcy of the defend-

ants is a bar to the plaintiff's demands asserted in the first five counts of his declaration. *Refused.*

3. The court holds, as matter of law, that the discharge in bankruptcy of the defendants is a bar to plaintiff's cause of action as set out in the sixth, seventh, eighth, ninth and tenth counts of his declaration. *Refused.*

4. The court holds, as matter of law, that under the evidence in the case, the discharge in bankruptcy of the defendants is a bar to the plaintiff's demands asserted in the sixth, seventh, eighth, ninth and tenth counts of his declaration. *Refused.*

5. The court holds, as matter of law, that the discharge in bankruptcy of the defendants is a bar to all of the plaintiff's demands as set out in his declaration. *Refused.*

6. The court holds, as matter of law, that under the evidence in the case, the discharge in bankruptcy of the defendants is a bar to all the demands asserted by the plaintiff in his declaration. *Refused.*

7. The court holds that, under the evidence in this case, the plaintiff never acquired the lawful title to any of the stock in question, and the plaintiff is not entitled to sustain the first five (5) counts of his declaration, or either thereof, and the plaintiff can not, under the evidence, maintain an action of trover for said stock. *Refused.*

8. That if the court finds from the evidence that the plaintiff employed the defendants to purchase from, or place orders with stock-brokers in Philadelphia, for Metropolitan Traction Company's stock, on the understanding that the defendants were only to advance margins to said Philadelphia brokers, then the title to such stock did not vest in the plaintiff until demand for with offer to
580 pay therefor and refusal of defendants to deliver so as to enable him to maintain *trover* therefor. *Refused.*

All of which eight propositions of law the court refused to "hold," and marked "refused," to which refusal of the court to hold said propositions of law, and the refusal to hold each of them, the defendants then and there excepted, and duly entered their exceptions herein.

And the defendants further asked the court to hold the following propositions of law:

9. That if the court finds from the evidence that the plaintiff employed the defendants to employ brokers in Philadelphia to make purchases of stock in their own name, but on the understanding that the plaintiff was to be given the benefit of such purchases or contracts, and that the defendants did not entirely pay for such stock, but only advanced a percentage of the price thereof to the Philadelphia brokers who carried the said stock or protected the contracts therefor as between themselves and the defendants, and that as between the plaintiff and defendants it was understood that the plaintiff should be given the benefit of all profits that might be made by virtue of such purchases or contracts, and that plaintiff should sustain all losses by reason thereof, and should pay the de-

fendants a commission or brokerage for their services, and that all the facts and circumstances connected with such transactions were fully known to the plaintiff, then, as a matter of law, the title to none of said stock could or did vest in the plaintiff until he demanded and offered to pay the balance due on same and was refused delivery by defendants, in such manner as to enable him to sustain an action of tort or trover for the conversion thereof, if the same was converted. *Held.*

Said proposition (No. 9) was held and was marked "held" by the court, to which holding and ruling by the court the plaintiff then and there duly excepted and entered his exception herein.

10. That if the court finds from the evidence that the
581 plaintiff employed the defendants to order or purchase stock of, or from, stockbrokers in Philadelphia, upon the advance of a margin by the defendants to said brokers; and if the court finds from the evidence that the defendants sold "short" stock of like kind for their own account with the same Philadelphia brokers, and advised the plaintiff thereof; and if the court further finds from the evidence that the plaintiff did not object thereto, but, on the contrary, acquiesced therein, then, as a matter of law, the plaintiff cannot in this action complain of like conduct on the part of the defendants subsequently thereto. *Held.*

Which said two propositions of law marked "nine" and "ten" the court held and marked "held," to which holding and ruling by the court as to each of said propositions the plaintiff then and there duly excepted, and entered his exceptions herein.

And the defendants further asked the court to hold the following propositions of law, marked "eleven," "twelve" and "thirteen."

11. The court holds, as matter of law, that the burden of proof in this case is upon the plaintiff, and that before he can recover under the 6th, 7th, 8th and 10th counts of his declaration, or either of them, he must prove by a preponderance of the evidence that he advanced the moneys therein severally alleged to have been advanced upon the representations therein severally charged to have been made by the defendants, and that such representations were then false. *Refused; admitted by pleadings.*

12. The court finds, as matter of law, that upon the evidence in this case the plaintiff is not entitled to recover in this form of action. *Refused.*

13. The court holds, as matter of law, that the defendants are entitled to judgment upon the pleadings and evidence dismissing this action. *Refused.*

582 Which said propositions of law marked "eleven," "twelve" and "thirteen" the court refused to hold, and marked "refused," to which refusal of the court to hold said propositions, and each of them separately, the defendants then and there excepted, and duly entered their exceptions herein.

And the defendants further asked the court to hold the following proposition of law, marked "fourteen," which the court held and marked "held":

14. The court holds as matter of law, that the plaintiff can not recover under the first five counts of his declaration, and also under the remaining counts of the declaration, or in other words, that a recovery on the first five counts would bar a recovery on the remaining counts. *Held.*

Said proposition fourteen was held by the court, and so marked "held," to which holding and ruling of the court the plaintiff then and there duly excepted, and duly entered his exception herein.

And on February 14, 1901, further proceedings were had in this cause, as follows:

FEBRUARY 14TH, THURSDAY, 1901—10:00 a. m.

BURKE
vs.
CRAWFORD ET AL.

Decision Rendered by Judge Dunne.

The COURT: I have fully considered the numerous briefs in this case and have reached the conclusion that there was a conversion of what is termed the reversionary interest in this stock by the defendants in this case, and that, therefore, if it was in trover they had a right to recover, and that it is not such a debt as is barred by the bankruptcy act.

I have also reached the conclusion, however, that the measure of damages as claimed by the plaintiff can not be allowed.
583 The object of the law is to grant a simple indemnity for a loss. An actual indemnity in this case would be what the stock was worth on the day that he demanded the stock; he was never entitled to the stock until May 20th. At that time Mr. Burke says that he went to the office with money sufficient to obtain this stock but that he was unable to obtain this stock.

Now Mr. Burke could have crossed the hall or gone to any stock-broker's office in this city at the time and purchased the stock for the exact amount with which he is credited on the books of the receiver of this company. That in my judgment is the actual loss in the case.

That being my view, I will render judgment for Mr. Burke for the amount shown by the books and interest from that day to the present at 5 per cent.

Mr. PENCE: Has your honor passed upon the propositions of law?

The COURT: Yes, I have marked most of them in pencil if the clerk will kindly ink them, some of them in ink and some in pencil.

Mr. BROWN: We desire first to except to the finding of the court.

The COURT: I expect both sides to do that.

Mr. BROWN: Well, I want to get this record right. We except to the finding of the court. And then I desire to make a motion for a new trial; I suppose that is likely to be overruled.

The COURT: Yes, I can dispose of that this morning. Let the record show a motion to set aside the finding of the court, motion overruled and exception, and motion for a new trial.

Mr. BROWN: I think I have a right within the term to file the motion and reasons in writing for a new trial and would like to except to the finding of the court overruling the motion for a new trial.

Now before the judgment there is just this, your honor, this is a case in which the plaintiff claims a *capias* should issue and
584 we should like to have the right or time to arrange for bond before judgment is entered. We don't think——

The COURT: Yes this matter is by no means clear and I will allow you any reasonable time that you desire to arrange for bond so as not to be placed under arrest.

Mr. MORAN: Well we want to be reasonable about the bond, but we want the judgment entered because we want them to go to the next term of the appellate court. We don't want any unreasonable rule with reference to this bond unless there was some unnecessary, unprecedented delay that would entitle us to take out process.

Mr. PENCE: I think I can pledge that Mr. Burke will not have them arrested.

The COURT: I will say in my opinion that the new bankruptcy act can easily bear two constructions, one favoring your contention, the other favoring Judge Moran's contention, but where it can receive two constructions I think the intent of the legislature ought to be sought and it was plainly, in my judgment, the intent of Congress in passing that act to prevent such debts as were created by fraud from being barred. I judge from the speeches of the gentlemen when the bill was passed in Congress that it was plainly their intent to exempt from the provisions of the bankruptcy act all debts created by fraud; that was certainly the intention of the old act, and while the phraseology was changed so as to bear the other construction I think the intent of the legislature was that such debts should not be barred.

Mr. BROWN: Your honor will remember that this is a great deal of a record and the bill of exceptions to be written up——

Mr. MORAN: Wait a minute, Mr. Brown, until we get our exceptions in.

We desire to preserve exceptions to the finding of the court and to the judgment so that if we see fit to file any cross errors we may do it.

585 The COURT: Yes there have been briefs on both sides, gentlemen.

Mr. BROWN: We understand that in making the appeal the case could go to the March term. The appellate court meets in March, does it not?

Mr. MORAN: Fifth of March.

Mr. BROWN: Yes, ten days after the first day of the term. The 30 days does not intervene between the last day of this term.

Mr. MORAN: Saturday is the last day of this term.

Mr. BROWN: Saturday is the last day of this term, and I believe it will be a physical impossibility for the clerk to get up our record.

The COURT: Why, it is a short record, isn't it?

Mr. BROWN: It is a great deal of a record.

The COURT: There was a good deal of talk and a good deal of authorities cited, but there was little evidence.

Mr. BROWN: There was a great deal of documentary evidence produced.

Mr. MORAN: That is a question with which this court has nothing to do; it has rendered its judgment. Counsel can always extend his time for filing a complete record in the court of appeals by filing a motion.

The COURT: Well, I will enter judgment to-day so as to force you if possible into the March term.

Mr. BROWN: I think we ought to be able to have more time.

Mr. PENCE: If only a copy of the decree was filed in the appellate court, they could amend their record afterwards. We don't want to be postponed on the docket, we want to get in so as to get as early a hearing as possible.

Mr. BURKE: I wish to call the court's attention to this: At the time the receiver, the Title & Trust Company, closed the account it computed the stock five hundred and fifty shares at 95 cents on the dollar.

The COURT: If I recollect his testimony he took the highest quotation on that day and gave you credit for it.

586 Mr. BURKE: Yes that is 95 cents, but out of the total amount that the stock came to he took $68.75 for commissions, he admitted that he did not sell any stock.

The COURT: Well, strike that out if he charged any commissions, for he could not charge any. Submit your figures to Mr. Brown to-day, make your computations and submit them to him and I will enter judgment to-day after you have agreed on that, on the figures. I don't think there will be any trouble about the time for the issuance of the *capias*.

Mr. BROWN: I am perfectly willing to take Mr. Pence's assurance that there will be no *capias* of arrest.

Mr. BURKE: For what length of time.

Mr. PENCE: Yes, for 30 days we will pledge ourselves.

Mr. BROWN: Very well, let these orders be entered.

The COURT: I will make the order to-day, Mr. Brown, after you gentlemen have got together.

Thereupon the court found the issues in the said cause for the plaintiff, and assessed his damages at the sum of $9,690, to which finding of the court the defendants, and also the plaintiff, then and there excepted, and duly entered their exceptions herein.

Whereupon the defendants, by their counsel, then and there moved to set aside the said finding of the court, which motion was overruled by the court, to which the defendants then and there excepted, and duly entered their exceptions herein.

Whereupon the defendant moved the court for another trial in

said cause, upon the ground that the said findings of the court were against the law of the evidence, and because of various errors of law made by the court, in the admission and exclusion of evidence, and in the holding and refusing of propositions of law, which said
587 motion for a new trial was overruled by the court.

To which overruling of said motion by the court the defendants then and there duly excepted, and entered their exceptions herein.

Thereupon the court gave judgment, and ordered that the plaintiff recover of the defendant- the sum of $9,690, and costs of issue, to which judgment of the court the defendants and also the plaintiff then and there duly excepted, and entered their exceptions herein.

Inasmuch as the matters above set forth do not appear of record, the defendants pray that the said court will set its hand and seal to this bill of exceptions, which is accordingly done this 6th day of March, A. D. 1901.

E. F. DUNNE,
Judge of the Circuit Court of Cook County.

Presented to me for ct. March 6 1901.

E. F. DUNNE.

588 And afterwards, to-wit: on the 5th day of March A. D. 1901 a certain appeal bond was filed in the office of the clerk of said court, in words and figures following, to-wit:

Know all men by these presents that we Richard C. Crawford and Edward A. Valentine, and Sarah L. Crawford and Edward H. Valentine of the county of Cook and State of Illinois, are held and firmly bound unto John E. Burke, also of the same county and State, in the penal sum of fifteen thousand dollars, lawful money of the United States for the payment of which well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly, severally and firmly, by these presents.

Witness our hands and seals this fourth day of March, A. D. 1901.

The condition of the above obligation is such, that whereas, the said John E. Burke did, on the 14th day of February A. D. 1901, in the circuit court of Cook county, in the State aforesaid, and of the January term thereof, A. D. 1901 recover a judgment against the above bounden Richard C. Crawford and Edward A. Valentine for the sum of nine thousand six hundred and ninety dollars and twenty-one cents, besides costs of suit; from which said judgment of the said circuit court of Cook county, the said Richard C. Crawford and Edward A. Valentine have prayed for and obtained an appeal to the appellate court, within and for the first district in said State.

Now therefore, if the said Richard C. Crawford and Edward A. Valentine shall duly prosecute their said appeal with effect, and moreover pay the amount of the judgment, costs, interests and damages rendered and to be rendered, against them in case the said

judgment shall be affirmed in said appellate court, then the above obligation to be void, otherwise to remain in full force and virtue.

RICHARD C. CRAWFORD. [SEAL.]
EDWARD A. VALENTINE. [SEAL.]
SARAH L. CRAWFORD. [SEAL.]
EDWARD H. VALENTINE. [SEAL.]

E. F. DUNNE, *Judge.*

O. K.
A. M. PENCE, *Pl'ff's Att'y.*

589 STATE OF ILLINOIS, } *ss:*
Cook County, }

I, John A. Cooke, clerk of the circuit court of Cook county, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the record except the bill of exceptions, the original of which is incorporated herein by stipulation, in a certain cause lately pending in said court, on the common law side thereof, between John E. Burke plaintiff and Richard C. Crawford defendant.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 14th day of March, 1901.

JOHN A. COOKE, *Clerk.*

590 RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Appellants,
vs.
JOHN E. BURKE, Appellee.

And now come the said Richard C. Crawford and Edward A. Valentine, appellants, and say that in the proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in holding in said cause certain propositions of law submitted by the plaintiff in said cause, the appellee in this court, and each of them, namely, the propositions of law submitted by the said plaintiff, John E. Burke, and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Second. The court erred in refusing to hold as a matter of law certain propositions of law and each of them, submitted by the defendants, Richard C. Crawford and Edward A. Valentine, in said cause, to wit: the propositions submitted by said defendants, the appellants herein, numbered 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, and 13.

Third. The court erred in finding the issues in said cause for the plaintiff.

Fourth. The court erred in not finding the issues in said cause for the defendants.

Fifth. The court erred in admitting improper and incompetent evidence offered by the plaintiff.

Sixth. The court erred in refusing to admit proper and competent evidence offered by the defendants.

591 *Seventh.* The court erred in rendering judgment for the plaintiff.

Eighth. The court erred in not rendering judgment for the defendants.

Ninth. The court erred in refusing to set aside its said finding upon the motion of the defendants.

Tenth. The court erred in refusing to grant a new trial of the said cause upon a motion of the defendants.

Eleventh. The finding and judgment of the court in the said cause is against the law and the evidence.

Twelfth. The court erred in not holding that the discharge in bankruptcy, proven by the defendants in said cause to have been granted to them during the pendency of said cause, was a bar to the said action.

Thirteeth. The court erred in not holding that the discharge in bankruptcy, proven by the defendants in said cause, to have been granted to them during the pendency of said cause, was a legal defense to said action.

Fourteenth. The court erred in holding that the special pleas filed by defendants respectively waived all other defenses to said action.

Fifteenth. The court erred in holding that any recovery on the facts proven could be had by the plaintiff in this form of action.

RICHARD C. CRAWFORD,
By PECKHAM, BROWN & PACKARD,
His Attorneys.

EDWARD A. VALENTINE,
By FLOWER, VROMAN & MUSGRAVE,
His Attorneys.

592 In the Appellate Court of Illinois, First District, March Term, A. D. 1901.

RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Appellants, vs. JOHN E. BURKE, Appellee.	Appeal from Circuit Court, Cook County.

And now comes John E. Burke, appellee in the above-entitled cause, and assigns cross errors, and says:

First. The court below erred in holding, as a matter of law, the ninth proposition of law submitted to it by the said appellants.

Second. The court below erred in holding, as matter of law, the tenth proposition of law submitted to it by the said appellants.

Third. The court below erred in holding, as matter of law, the fourteenth proposition of law submitted to it by the appellants.

Fourth. The court below erred in adopting a wrong rule or measure of damages in assessing or estimating the appellee's damages in this case.

Fifth. The court below erred in taking the market price or value of the stock in controversy on the 20th or 21st day of May, 1895, as the basis on which to assess or estimate the appellee's damages in this case.

Sixth. The court below erred in not allowing the appellee the amount of damages shown in the evidence to have been sustained by him, by reason of the matters alleged in the several counts of his declaration.

Seventh. The court below erred in rendering judgment in favor of appellee for only the sum of $9,690.21, when, according to the law and the evidence in said cause, the court should have rendered judgment in favor of appellee for a much larger sum, to wit: the sum of $20,000.

Wherefore, the said appellee prays that the judgment rendered in his favor in the court below be increased, and that judgment
593 be rendered in his favor and against the appellants, by this court, for the said sum of $20,000.

JOHN E. BURKE,
By T. A. MORAN AND
A. M. PENCE,
Attorneys for Appellee.

In the Appellate Court, First District, Illinois.

R. C. CRAWFORD ET AL., Appellants,
vs.
J. E. BURKE, Appellee.
} No. 9943.

Appeal from Cook circuit.

I, Thomas N. Jamieson, clerk of the appellate court, within and for the first district of Illinois hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 14th day of March A. D. 1901 by said appellants.

In testimony whereof, I have hereunto set my hand and seal of said court, at Chicago, this 21st day of July A. D. 1902.

THOMAS N. JAMIESON,
Clerk of the Appellate Court,
First District, Illinois.

[SEAL.]

594 At a term of the appellate court, begun and held at Chicago, on Tuesday, the 4th day of March in the year of our Lord one thousand nine hundred and two within and for the first district of the State of Illinois.

Present, Hon. Henry V. Freeman, presiding justice.
" " Arba A. Waterman, justice.
" " Henry M. Shepard, justice.
Thomas N. Jamieson, clerk. Earnest J. Magerstadt, sheriff.

R. C. CRAWFORD ET AL., Appellants,
vs.
J. E. BURKE, Appellee. } No. 9943.

Appeal Cook circuit. Error to Cook.

Filed Sep. 18, 1902.

C. MAMER,
Clerk of Supreme Court.

Be it remembered, that on the 28th day of May A. D. 1901, it being one of the days of the March term, A. D. 1901, certain proceedings were had in said court and entered of record in words and figures following, to-wit.

595 R. C. CRAWFORD ET AL.
vs.
J. E. BURKE. } 9943. Appeal Circuit.

This day came appellee and moved the court to extend the time fifteen days to file briefs; and the court being fully advised doth order that said time be extended.

And afterwards, on the 14th day of June, A. D. 1901, the following proceedings were had and entered of record in said cause, to-wit:—

596 R. C. CRAWFORD ET AL.
vs.
J. E. BURKE. } 9943. Appeal Circuit.

This day came appellee and moved the court to extend the time five days to file briefs; and the court being fully advised doth order that said time be extended.

And afterwards, on the 19th day of June, A. D. 1901, the following proceedings were had and entered of record in said cause, to-wit:—

597 R. C. CRAWFORD ET AL. vs. J. E. BURKE. } 9943. Appeal Circuit.

This day came appellee and moved the court to extend the time to June 29, to file briefs, and that the appellants may have ten days thereafter to file reply briefs; and the court being fully advised doth order that said time be extended.

And afterwards, on the 9th day of July, A. D. 1901, the following proceedings were had and entered of record in said cause, to-wit:—

598 R. C. CRAWFORD ET AL. vs. J. E. BURKE. } 9943. Appeal Circuit.

This day came appellants and moved the court to extend the time to July 20, 1901, to file a reply brief; and the court being fully advised doth order that said time be extended.

And afterwards, on the 10th day of July, A. D. 1901, the following proceedings were had and entered of record in said cause, to-wit:—

599 R. C. CRAWFORD ET AL. vs. J. E. BURKE. } No. 9943. Appeal from Circuit.

This cause having this day been reached in the call of the docket, and no one appearing to argue the same, and the court, not being fully advised in the premises, doth order that said cause be taken under advisement on briefs filed and to be filed by appellee by Oct. 1, 1901.

And afterwards, on the 25th day of April, A. D. 1902, the same being one of the days of the March term, 1902, of said court, the following proceedings were had and entered of record in said cause, to-wit:—

600 R. C. CRAWFORD ET AL. vs. J. E. BURKE. } 9943. Appeal Circuit.

This day came appellee and moved the court for leave to cite additional authorities and to correct the briefs filed herein, and the court being fully advised doth order that said motion be allowed.

And afterwards, on the 2nd day of July, A. D. 1902, the following proceedings were had and entered of record in said cause, to-wit:—

601 RICHARD A. CRAWFORD and EDWARD A. Valentine, Appellants, vs. JOHN E. BURKE, Appellee. } No. 9943. Appeal Cook Circuit.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that one of the justices of this court took part in the trial of the case below, and that the two remaining justices are unable to agree on the case as presented by the record and proceedings aforesaid, and it therefore appearing that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error; therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellee recover of and from the said appellants his costs, by him in this behalf expended, to be taxed, and that he have execution therefor.

And afterwards, on the 11th day of July, A. D. 1902, the following proceedings were had and entered of record in said cause, to-wit:—

602 RICHARD C. CRAWFORD and EDWARD A. Valentine vs. JOHN E. BURKE. } No. 9943. Error to Cook. Appeal from Cook Circuit.

This day came appellants by their counsel, and moved the court for an appeal from the order and judgment of this court in said cause to the supreme court of Illinois; and the court being fully advised in the premises, doth order that an appeal be allowed herein to the said supreme court, on condition that appellants do within twenty days from this date, execute and file in said cause a good and sufficient appeal bond, conditioned according to law, in the penal sum of fifteen thousand dollars, with surety thereto, to be approved by the court.

And afterwards on the 21st day of July A. D. 1902, the following proceedings were had and entered of record in said cause, to-wit:

603 R. C. CRAWFORD ET AL. vs. J. E. BURKE. } No. 9943. Error to Cook. Appeal from Cook Circuit.

This day came appellants by their counsel, and presented their certain appeal bond in said cause in the penal sum of fifteen thousand dollars, with Edward H. Valentine and Sarah L. Crawford as surety- thereto; and the court, being fully satisfied as to the qualifications of said surety-, doth order that said appeal bond be, and the same is hereby taken, approved and filed herein.

And afterwards, on the same day, to-wit: the 21st day of July A. D. 1902, an appeal bond was filed in said cause, which said bond is in the words and figures following, to-wit:—

604 Know all men by these presents, that we, Richard C. Crawford and Edward A. Valentine, as principals, and Edward H. Valentine and Sarah L. Crawford, as sureties, all of the county of Cook and State of Illinois, are held and firmly bound unto John E. Burke, also of the same county and State, in the penal sum of fifteen thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this 16th day of July, A. D. 1902.

The condition of the above obligation is such that whereas, the said John E. Burke did, on the 14th day of February, 1901, in the circuit court of Cook county, in the State aforesaid, and of the January term thereof, A. D. 1901, recover a judgment against the said Richard C. Crawford and Edward A. Valentine for the sum of nine thousand six hundred ninety dollars, besides costs of suit, from which said judgment of the said circuit court of Cook county, the said Richard C. Crawford and Edward A. Valentine prayed for and obtained an appeal to the appellate court within and for the first district of said State, and whereas, the said appellate court did, on the 2nd day of July, A. D. 1902, and at the March term thereof, A. D. 1902, affirm the judgment of the court aforesaid, and did render judgment against the above bounden Richard C. Crawford and Edward A. Valentine for costs of suit, from which order of affirmance and judgment of the said appellate court the said Richard C. Crawford and Edward A. Valentine have prayed for and obtained an appeal to the supreme court of the State of Illinois.

605 Now therefore, if the said Richard C. Crawford and Edward A. Valentine shall duly prosecute their said appeal with effect, and moreover pay the amount of the judgment, costs, interests and damages rendered and to be rendered against said Richard C. Crawford and Edward A. Valentine in case the said judgment shall

be affirmed in said supreme court, then the above obligation to be void, otherwise to remain in full force and virtue.

SARAH L. CRAWFORD. [SEAL.]
EDWARD A. VALENTINE. [SEAL.]
EDWARD H. VALENTINE. [SEAL.]
RICHARD C. CRAWFORD. [SEAL.]

Approved.

HENRY V. FREEMAN, *P. J.*

O. K.

JOHN E. BURKE, *Appellee.*

606 I, Thomas N. Jamieson, clerk of the appellate court, in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings and appeal bond of the said appellate court in the above entitled cause, of record in my office.

[SEAL.] In testimony whereof, I have set my hand and affixed the seal of the said appellate court, at Chicago, this 21st day of July in the year of our Lord one thousand nine hundred and two.

THOMAS N. JAMIESON,
Clerk of the Appellate Court of the First District.

607 RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Appellants, *vs.* JOHN E. BURKE, Appellee. } Appeal from the Appellate Court of the First District to the Supreme Court of Illinois.

And now come the said Richard C. Crawford and Edward A. Valentine, appellants, in the supreme court of Illinois, and say that in the proceedings in the appellate court of the first district, there is manifest error, in this, to-wit:

First. The said appellate court of the first district erred in affirming the judgment in said cause in favor of the plaintiff rendered by the circuit court of Cook county.

Second. The said appellate court of the first district erred in not reversing the judgment of the circuit court of Cook county in favor of the plaintiffs, against the defendant in the aforesaid cause.

Third. The said appellate court of the first district erred in not reversing the judgment of the circuit court of Cook county in the said cause in favor of the plaintiffs, or in not reversing the said judgment and remanding the said cause to said circuit court of Cook county.

Fourth. The said appellate court of the first district erred
608 in rendering a judgment for costs in the said appellate court in favor of the appellee in said cause against the said appellants.

Fifth. The said appellate court of the first district erred in not ren-

dering a judgment for costs against the appellee in said cause in favor of the said appellants.

Sixth. The said appellate court of the first district erred in not holding that the fifteen several assignments of error assigned by the appellants as error in the proceedings of the circuit court of Cook county, were well assigned, and therefore erred in not reversing said judgment or in not reversing said judgment and remanding said cause to the circuit court of Cook county.

Seventh. The said appellate court of the first district erred in not holding that in said cause certain propositions of law submitted by the plaintiff in the circuit court, the appellee in the appellate court and in this court, and each of them, to the circuit court of Cook county, and numbered one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), and twenty (20), should not have been held by the circuit court of Cook county, and therefore erred in affirming the judgment of said circuit court in said cause.

Eighth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in refusing to hold as a matter of law certain propositions of law and
609 each of them submitted by the defendants, Richard C. Crawford and Edward A. Valentine, in said cause to said circuit court, namely, the propositions submitted to said circuit court by said defendants in said court, (the said appellants in the appellate court, and in the supreme court,) numbered one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), eleven (11), twelve (12), and thirteen (13), and the said appellate court erred in therefore affirming the judgment of the circuit court in said cause.

Ninth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in finding the issues in said cause for the plaintiff, and therefore said appellate court erred in affirming the said judgment of said circuit court.

Tenth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in not finding the issues in said cause for the defendants, and therefore said appellate court erred in affirming the said judgment of said circuit court.

Eleventh. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in admitting improper and incompetent evidence offered by the plaintiff, and therefore in affirming the said judgment of said circuit court.

Twelfth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in refus-
610 ing to admit proper and competent evidence offered by the defendants, and therefore the said appellate court erred in affirming the said judgment of said circuit court.

Thirteenth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in rendering judgment for the plaintiff, and therefore the appellate court erred in affirming the said judgment of said circuit court.

Fourteenth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in not rendering judgment for the defendants, and therefore the appellate court erred in affirming the said judgment of said circuit court.

Fifteenth. The said appellate court of the first district erred in not holding that the circuit court erred in refusing to set aside its findings upon motion of the defendants, and therefore the said appellate court erred in affirming the said judgment of said circuit court.

Sixteenth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in refusing to grant a new trial of the said cause upon the motion of the defendants, and therefore the said appellate court erred in affirming the said judgment of said circuit court.

Seventeenth. The said appellate court of the first district erred in not holding that the findings and judgment in the circuit
611 court of Cook county in said cause were against the law and the evidence, and therefore the said appellate court erred in affirming the said judgment of said circuit court.

Eighteenth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in not holding that the discharge in bankruptcy proven by the defendants in the circuit court, (the appellants in the said appellate court,) to have been granted to them during the pendency of said cause, was a bar to the said action, and therefore the said appellate court erred in affirming the said judgment of said circuit court.

Nineteenth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in not holding that the discharge in bankruptcy proven by the defendants in the said circuit court, (the appellants in the said appellate court,) to have been granted to them during the pendency of said cause, was a legal defense to said action, and therefore the appellate court erred in affirming the said judgment of said circuit court.

Twentieth. The said appellate court of the first district erred in not holding that the circuit court of Cook county erred in holding that the special pleas filed by the defendants, respectively, waived all other defenses to said action, and therefore the said appellate court erred in affirming the said judgment of said circuit court.

Twenty-first. The said appellate court of the first district
612 erred in not holding that no recovery on the facts proven, could be had by plaintiff in this form of action, and therefore the said appellate court erred in affirming the said judgment of said circuit court.

RICHARD C. CRAWFORD,
By PECKHAM, BROWN & PACKARD,
His Attorneys.

EDWARD A. VALENTINE,
By FLOWER, VROMAN & MUSGRAVE,
His Attorneys.

613 In the Supreme Court of Illinois, October Term, 1902.

RICHARD C. CRAWFORD and EDWARD A. Valentine, Appellants, vs. JOHN E. BURKE, Appellee.	Appeal from the Appellate Court, First District.

Cross Errors.

And now comes John E. Burke, appellee in the above-entitled cause, and assigns cross errors, and says:

1. The said appellate court erred in not holding that the circuit court erred in holding the 9th proposition of law submitted to it by the appellants.

2. The said appellate court erred in not holding that the circuit court erred in holding the 10th proposition of law submitted to it by the appellants.

3. The said appellate court erred in not holding that the circuit court erred in holding the 14th proposition of law submitted to it by the appellants.

4. The said appellate court erred in not holding that the circuit court erred in not allowing the appellee the amount of damages shown by the evidence to have been sustained by him.

5. The said appellate court erred in not holding that the circuit court erred in rendering judgment in favor of appellee for only the sum of $9,690.21, when, according to the evidence in said cause, the circuit court should have rendered judgment in favor of appellee for a much larger sum, to wit, the sum of $20,000.

Wherefore, the appellee prays that the judgment rendered in his favor in the court below, and affirmed in said appellate court, be increased, and that judgment be rendered in this court in his favor and against the appellants for the said sum of $20,000.

JOHN E. BURKE, *Appellee.*

614 In the Supreme Court of Illinois, Northern Grand Division, October Term, 1902.

RICHARD C. CRAWFORD and EDWARD A. Valentine, Appellants, vs. JOHN E. BURKE, Appellee.	Appeal from Appellate Court, First District.

Additional Cross-errors.

And now comes the appellee in the above entitled cause, and, by leave of the court, assigns upon the record and in his brief the following additional cross-errors:—

6. The appellate court erred in not holding that the circuit court

erred in adopting a wrong rule or measure of damages in assessing or estimating the appellee's damages in this case.

7. The appellate court erred in not holding that the court below erred in taking the market price or value of the stock in controversy on the 20th or 21st day of May, 1895, as the basis on which to assess or estimate the appellee's damages in this case.

JOHN E. BURKE, *Appellee.*

PENCE & CARPENTER AND
T. A. MORAN,
Of Counsel.

615 And afterwards, to-wit: on the 17th day of October, A. D. 1902, certain proceedings were had in said court, and entered of record, among which is the following, viz:

RICHARD C. CRAWFORD and EDWARD A. Valentine
vs.
JOHN E. BURKE.
} 2689. Appeal from Appellate Court of Illinois, First District.

Now on this day come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that —— —— appellant, hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee —— —— having entered motion to affirm said judgment and for costs and *procedendo*, and said motion being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be and the same is hereby taken under advisement.

616 At a supreme court, begun and held at Springfield on Tuesday, the third day of February, in the year of our Lord one thousand nine hundred and three, within and for the State of Illinois,

Present: Benjamin D. Magruder, chief justice. Jacob W. Wilkin, justice, Joseph N. Carter, justice, James H. Cartwright, justice, Carroll C. Boggs, justice, John P. Hand, justice, James B. Ricks, justice, Howland J. Hamlin, attorney general. B. H. Brainerd, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the eighteenth day of February, A. D. 1903, the same being one of the days of the term of court aforesaid

the following proceedings were by said — court, had and entered of record, to wit:

RICHARD C. CRAWFORD and EDWARD A. Valentine *v.* JOHN E. BURKE.	No. 2689. Appeal from Appellate Court of Illinois, First District.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: therefore it is considered by the court, that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error, and it is further considered by the court, that the said appellee recover of and from the said appellants his costs by him in this behalf expended, and that he have execution therefor:

617 And afterwards, to-wit: on the fourth day of March, A. D. 1903, there was filed in the office of the clerk of said court, a certain petition for writ of error, and order granting the same, which said petition and order are in the words and figures following, viz:

618 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

RICHARD C. CRAWFORD and EDWARD A. Valentine, Appellants, *vs.* JOHN E. BURKE, Appellee.	No. 2689 in the Supreme Court of Illinois.

To the honorable chief justice of the supreme court of the State of Illinois:

The petition of Richard C. Crawford and Edward A. Valentine respectfully shows that on the 18th day of February, A. D. 1903 the supreme court of the State of Illinois rendered a judgment against your petitioners in a certain cause wherein your petitioners Richard C. Crawford and Edward A. Valentine were appellants and John E. Burke was appellee, it being a cause in which your petitioners the said Richard C. Crawford and Edward A. Valentine had appealed from the appellate court of the first district of Illinois to the supreme court of Illinois. The said cause in the appellate court was one in which the said Richard C. Crawford and Edward A. Valentine were

appellants and the said John E. Burke was appellee, and was an appeal from the circuit court of Cook county in a cause in
619 which the said John E. Burke was plaintiff and the said Richard C. Crawford and Edward A. Valentine were defendants.

The said judgment of the supreme court of Illinois in said cause was in the words and figures following, as will appear by reference to the record and proceedings in said cause:

"And now, on this day, this cause having been argued by counsel, "and the court having diligently examined and inspected, as well "the record and proceedings aforesaid, as the matters and things "therein assigned for error, and being now sufficiently advised of "and concerning the premises, for that it appears to the court now "here, that neither in the record and proceedings aforesaid, nor in the "rendition of the judgment aforesaid, is there anything erroneous, "vicious or defective, and that in that record there is no error: "Therefore it is considered by the court, that the judgment aforesaid "be affirmed in all things and stand in full force and effect, not-"withstanding the said matters and things therein assigned for "error, And it is further considered by the court, that the said "appellee recover of and from the said appellants his costs by him "in this behalf expended, and that he have execution there-"for."

620 The said supreme court of Illinois at the time of rendering the said judgment, filed an opinion in the said cause, a copy of which opinion is annexed hereto marked Exhibit "1."

And your petitioners respectfully show that there was a judgment in the said cause in the circuit court of Cook county in favor of John E. Burke against your petitioners for the sum of nine thousand, six hundred and ninety dollars ($9,690) and costs, and that the judgment in the appellate court of the first district of Illinois was an affirmance of the judgment in said circuit court of Cook county in favor of said Burke against your petitioners, together with a judgment for the costs of said appeal in said appellate court, and that the judgment in the supreme court of Illinois was a judgment of affirmance of the said judgment of the said appellate court, and of said circuit court and for the costs of said appeal in said supreme court, and that its result is to make so far as the highest court of the said State of Illinois can decide said cause, a judgment effective and valid against your said petitioners for nine thousand, six hundred and ninety dollars ($9,690) and judgments for the costs of suit in the three courts aforesaid.

And your petitioners further respectfully show that the said supreme court of Illinois is the highest court of the State of Illinois in which a decision in said suit could be had.

And your petitioners claim the right to remove said judg-
621 ment to the Supreme Court of the United States by writ of error under the statutes of the United States authorizing writs of error to State courts under section 709 of the Revised Statutes of the United States and section 999 of the Revised Statutes of

the United States, because the said petitioners claimed in said circuit court and in said appellate court and in said supreme court of the State of Illinois that as to the cause of action and liability set up by the pleadings in said cause by the said John E. Burke as against them the said petitioners, they had been duly discharged in bankruptcy under the act of the Congress of the United States approved July 1st, 1898 entitled "An act to establish a uniform system of bankruptcy throughout the United States."

And because the said John E. Burke did not deny the bankruptcy proceedings and the discharge of the defendants under the said act above named, but replied that said causes of action in the declaration in said cause mentioned were not in respect of a debt or claim made proveable by acts of Congress relating to bankruptcy against the individual or co-partnership estates of the said defendants, and that each of the said causes of action were in respect of such debts, claims, demands or damages excepted from the operation of the discharge in bankruptcy by the said acts of Congress. And because the said acts as to said plea of the discharge in bankruptcy and of said replication turned wholly upon the construction to be given to section 17 of chapter 3 of said act of Congress approved July 1st, 1898 entitled "An act to establish a uniform system of bankruptcy throughout the United States," and upon such construction as might be given to section 63 of chapter 7
622 of said bankruptcy act above described, and because the said circuit court of Cook county decided that said cause of action so stated in the pleadings in said cause by the said declaration of the said John E. Burke against your petitioners was not such a case as was released or discharged by the discharge in bankruptcy which your petitioners averred and which was admitted to have been granted by the district court of the United States for the northern district of Illinois; and because the said appellate court affirmed the said judgment and the said supreme court of Illinois, being the highest court in said State of Illinois in which a decision in said cause could be obtained, affirmed said judgments and decisions of the said circuit court of Cook county and the appellate court of the first district and thereby held that the said causes of action were not such as were discharged by a discharge in bankruptcy granted as aforesaid.

And your petitioners further claim the right to remove said judgment by writ of error to the Supreme Court of the United States under the aforenamed statutes of the United States because, they say, that the said circuit court of Cook county, Illinois, and the said appellate court of the first district of Illinois in affirming said judgment of said circuit court of Cook county and the said supreme court of the State of Illinois in affirming the judgments of the said appellate court of the first district of Illinois and of the circuit court of Cook county, held also that the evidence in said cause presented by the said John E. Burke showed a cause of action which was not dischargeable or released under the said 17th section of
623 the bankruptcy act above described, and your petitioners aver that such dscision beyond and above and irrespective of

the decision concerning the cause of action as set forth in the declaration of said John E. Burke in said cause involves the construction of the said 17th section of the said bankruptcy act above described, all of which appears by the record of the proceedings in the said cause in the said supreme court of Illinois.

Wherefore your petitioners say that by a final judgment in a suit in the highest court of the State of Illinois in which a decision in a suit could be had, there was a right, title, privilege and immunity claimed under a statute of the United States by your petitioners and the decision was against the right, title, privilege and immunity which was especially set up and claimed by your petitioners under such statute, and wherefore and in accordance with the statute made and provided therefor your petitioners pray for an allowance of a writ of error returnable into the Supreme Court of the United States and of a citation and supersedeas.

And they will ever pray.

RICHARD C. CRAWFORD,
EDWARD A. VALENTINE,
Petitioners.
EDWARD O. BROWN,
Of Peckham, Brown & Packard,
CHARLES E. VROMAN,
Of Musgrave, Vroman & Lee,
Counsel for Petitioner.

624 EXHIBIT 1.

At a supreme court, begun and held at Springfield on Tuesday, the third day of February, in the year of our Lord one thousand nine hundred and three, within and for the State of Illinois,

Present: Benjamin D. Magruder, chief justice. Jacob W. Wilkin, justice, Joseph N. Carter, justice, James H. Cartwright, justice, Carroll C. Boggs, justice, John P. Hand, justice, James B. Ricks, justice, Howland J. Hamlin, attorney general. Benjamin H. Brainerd, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, that afterwards, to-wit, on the eighteenth day of February, 1903, the opinion of the court was filed in the words and figures following, to-wit:

RICHARD A. CRAWFORD ET AL.
vs.
JOHN E. BURKE.
} No. 2689. Error to ——. Appeal from First District.

625 Docket No. 2689, Agenda 25, Oct., 1902.

RICHARD C. CRAWFORD ET AL.
v.
JOHN E. BURKE.

Mr. Justice CARTER delivered the opinion of the court:

This was an action on the case, brought in the Cook circuit court by John E. Burke, the appellee, against Richard C. Crawford and Edward A. Valentine, the appellants, to recover damages for the wrongful and fraudulent conversion of certain shares of stock belonging to the plaintiff, and of the proceeds of the sale thereof, or of his reversionary interest therein, to their own use, as alleged in the first five counts of the declaration, and as alleged in the last five counts, for false and fraudulent representations made by the defendants to the plaintiff, to the effect that they had and held, on purchases made by them at his request, a certain large number of shares of said stock, in order to obtain, and whereby they did obtain, from him large sums of money as margins or part payments on such stock, when in truth and in fact they did not have or hold such shares of stock, but had previously, without his knowledge or consent, sold the same on their own account, with intent, as alleged in all the counts, to cheat and defraud the plaintiff. The suit was brought in 1897, and the defendants pleaded not guilty. Afterward, in 1901, Congress having in the meantime enacted the bankrupt law of 1898, and the defendants having, in proceedings thereunder, been duly discharged in bankruptcy, they filed their separate pleas *puis darrein continuance* setting up such discharge, and also, in the same pleas, traversing the positive fraud and fraudulent intent alleged in the declaration. Replications were filed by the plaintiff, not denying the bankruptcy proceedings and the defendants' discharge therein, but taking issue, in the language of the pleas, on the matter averred in them traversing the alleged fraud. A jury was waived, trial had by the court, and judgment was rendered for the plaintiff for $9690 and costs. The defendants appealed. One of the judges of the appellate court having heard the cause on a former trial took no part, and the other two judges being unable to agree, the judgment was affirmed. The defendants then took this appeal to this court.

The evidence tends to prove that the defendants were associated together as partners, doing business in Chicago as stock
626 brokers, and that in 1894 and 1895, acting as the brokers and agents of the plaintiff, they purchased at his request, from time to time, through other brokers in Philadelphia on the

stock exchange in that city, upwards of one hundred shares of Metropolitan Traction stock, and also by agreement with the plaintiff took over a large number of other shares of the same stock from other brokers, agents of the plaintiff, who had previously purchased and were carrying the same for him, until the defendants had and held for him five hundred and fifty shares of such stock, upon which he had paid the required margins or payments on account of such stock to a large amount of money, and which said stock the defendants agreed to carry for the plaintiff, he having agreed to make such further payments on the purchase price as should be required, and which agreement he had faithfully performed on his part. At one time, about April 1, 1895, when the defendants, by the course of dealings between the parties, should have had for the plaintiff, as they then represented to him they did have and were carrying for him, five hundred and fifty shares of said stock, the defendants demanded of him, because of a falling market, $3800 as further margins or payments on that number of shares, and which amount he then paid, when the truth was that they had previously sold all but fifty of said shares without his consent or knowledge and without having rendered to him any account for the same whatever. They were then insolvent, and about May 20, following, failed in business and a receiver was appointed. Shortly before such failure plaintiff offered to pay the balance of the unpaid purchase price due on said five hundred and fifty shares and demanded delivery to him, but the defendants were wholly unable to comply with the demand.

The principal question in the court below was and in this court also is, whether or not recovery by the plaintiff was barred by the discharge in bankruptcy set up in the pleas *puis darrein continuance*. This question is presented by the holding of the court as law in the decision of the case, certain propositions asked by the plaintiff, applicable, respectively, to different ones of the several alleged tortious acts of the defendants. It will be necessary to state here only one of such propositions, viz., the second:

2. "If the evidence shows that the defendants were acting as the brokers and agents of the plaintiff, and that on or about the
627 10th day of January, 1895, the defendants as such brokers and agents, were carrying for him, and had in their possession or under their control for the plaintiff and belonging to him, four hundred shares of Metropolitan Traction stock in controversy in this cause, and that on or about the said 10th day of January, 1895, the defendants, without the knowledge or consent of the plaintiff, sold or caused to be sold one hundred shares of said stock, and converted or appropriated to their own use the said one hundred shares, or the proceeds of the sale thereof, or the plaintiff's reversionary interest in said one hundred shares or his interest in said proceeds, and that such sale, conversion or appropriation was made with the intent to commit upon the plaintiff a positive fraud, involving intentional wrong, then the court holds that the defendants' conduct was such that their discharge in bankruptcy is not a legal defense to

plaintiff's claim for such damages, if any, as he may have sustained by reason of such sale, conversion or appropriation."

The court refused to hold as law in the case, at the request of the defendants, that the discharge in bankruptcy was a bar to any recovery in the case by plaintiff, under his declaration.

There was sufficient evidence for the court to find the facts as they were hypothetically stated in the plaintiff's propositions and also substantially as they were alleged in the declaration, but whether such debt or liability was released by the discharge in bankruptcy depends on the proper construction to be given to the act of Congress. Section 17 of the present bankruptcy act is as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

The construction contended for by the defendants is, that even if the plaintiff's demands be held to be a debt created by
628 the fraud of the defendants, still such debt was barred by the discharge in bankruptcy because it was not created while they were acting as officers or in any fiduciary capacity. Leaving out matter not applicable to this case, the section reads: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." The defendants were not acting as officers, and it is conceded that they were not acting in any fiduciary capacity within the meaning of the statute, but appellants insist that the phrase "while acting," etc., qualifies and limits all that precedes it in this the fourth exception, so that the act of fraud, embezzlement or misappropriation must have been committed while the defendants were acting as officers or in some trust capacity. While the meaning of the statute is not as clear as it might have been made, we are of the opinion the true construction is this: that the discharge will not release a bankrupt from his debt created (1) by his fraud; (2) by his embezzlement; (3) by his misappropriation; (4) by his defalcation while acting as a public officer or in any fiduciary capacity. Such is the grammatical construction of the sentences as punctuated, and while punctuation is not necessarily a part of the statute and is not controlling, and may even be wholly disregarded when necessary to give effect to the intention of the legislature otherwise appearing, still it is proper for consideration in determining the grammatical construction of written language, and may shed some

light on the meaning of a statute when otherwise doubtful. Osborn v. Farrell, 87 Ill. 89; 23 Am. & Eng. Ency. of Law, 334; 11 id. 521, and cases there cited; Hamilton v. Steamboat, etc. Co. 16 Ohio St. 428; Joy v. St. Louis, 138 U. S. 32; Cushing v. Warwick, 9 Gray, 385; State v. Jernigan, 3 Murphy, 18.

But other reasons of a more potent character may be given for the construction we adopt. In the first place, the former bankruptcy act of 1867 excepted from the operation of the discharge, debts created by the fraud or embezzlement of the bankrupt acting as an individual, and the word "defalcation" in that act was confined to public officers and those acting in a fiduciary capacity. Section 33 of the act provided "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer
629 or while acting in any fiduciary character, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." (U. S. Rev. Stat. 5117.) In Strong v. Bradner, 114 U. S. 555, it was held that a debt fraudulently contracted by commission merchants was not released by their discharge in bankruptcy under the act of 1867, and that the term "fraud" in that act meant positive fraud, involving moral turpitude or intentional wrong, and not mere constructive fraud. (See, also Forsyth v. Vehmeyer, 117 U. S. 117; 176 Ill. 359.) Such having been the construction placed on the former act, the present one, though not equally clear, being substantially the same, should receive the same construction. (Lowell on Bankruptcy, p. 395; Black on Interpretation of Laws, 161; *In re* Rasch, 97 Fed. Rep. 761.) Had Congress intended to make so important a change in the law in the respect mentioned as appellants contend was made by the act of 1898, we would expect to find in the statute language clearly evincing such intention. A mere change in phraseology, apparently for the sake of brevity, rendering the meaning somewhat obscure, cannot be regarded as showing a legislative intent to depart so radically from precedents established by previous bankruptcy legislation and judicial decisions as to provide that debts created by the fraud or embezzlement of the bankrupt should be released by his discharge in bankruptcy, unless such fraud or embezzlement should be committed while the bankrupt was acting as a public officer or in a fiduciary capacity. (See Willis v. Eastern, etc. Co. 169 U. S. 295; Potter's Dwarris, 181, note.) In the second place the second exception to the operation of the discharge is, "judgments in actions for frauds," etc. Such judgments were doubtless excepted to avoid the otherwise reasonable construction that as judgments, like other judgments merging the cause of action, they would come within the operation of the discharge in bankruptcy. (Frey v. Torrey, 73 N. Y. Supp. 201.) But it was still necessary to make provision for debts fraudulently created,—that is, those created by fraud in fact,—where no judgment had been obtained, and this was done in the fourth exception. No good reason can be perceived why a judgment for fraud should be excepted from the operation of the discharge and not a debt or an ob-

ligation created by fraud or crime. In the next place,
630 while our attention has not been called to any decision of the Supreme Court of the United States construing this part of the statute of 1898, we are of the opinion that the weight of authority supports the construction we have given. (See authorities already cited, and Bracken *v.* Milner, 104 Fed. Rep. 522; *In re* Cole, 106 *id.* 106; Frey *v.* Torrey, 73 N. Y. Supp. 201; 75 *id.* 40; 76 *id.* 332.) Cases holding a contrary view are cited by appellants, but we cannot regard them as controlling or as supported by correct judicial reasoning.

Counsel for appellants contend, however, that their alleged fraud was only implied or constructive fraud, and not fraud in fact, involving intentional wrong doing or moral turpitude, and that even if opposing counsel be correct in their interpretation of the statute, still the discharge of appellants would release their said debt so created by their constructive fraud. The law undoubtedly is, and all the authorities so hold, that the fraud must be fraud in fact and not merely fraud implied by law. It must be positive fraud, involving moral turpitude. It seems clear, however, that the declaration in this case sufficiently charges the *mala fides* of the defendants in the transaction, setting forth their wrongful and fraudulents acts, and that such acts were done with intent to cheat and defraud the plaintiff, and there can be no doubt that the evidence is legally sufficient to support the declaration.

But we cannot agree with appellants that this case comes to this court precisely as it went to the appellate court. The judgment of the appellate court is as conclusive upon all controverted questions of fact in this case as in any other, notwithstanding the recitals in the judgment of affirmance showing the disagreement between the two judges who considered the case in that court. The statute makes no exception of such a case. We must regard all questions of fact as settled against appellants, and this includes all inferences of fact arising from facts actually proved. There is no evidence in the record except that produced on behalf of the plaintiff. On behalf the defendants, one of them offered himself as a witness to disprove the alleged fraud in the transactions complained of. On objection of the plaintiff the testimony was not admitted, and the ruling was excepted to. This ruling of the court was based on the view that the pleas *puis darrein continuance* waived
all prior pleas and admitted the cause of action as alleged
631 in the declaration, and constituted the discharge in bankruptcy the sole defense. We have held that such a plea waives all prior pleas, and that no defense can be urged except that set up in the plea *puis*. (Mount *v.* Scholes, 120 Ill. 394; City of East St. Louis *v.* Renshaw, 153 *id.* 491; Angus *v.* Chicago Trust and Savings Bank, 170 *id.* 298.) Upon this view of the law the court also held certain propositions, asked by the plaintiff, as law in the decision of the case, to the effect that all the material matters of fact alleged in the declaration stood admitted by the pleadings. Whether this well settled rule of pleading was strictly applicable in this case

in view of the character of the plea and the issue taken on it by the plaintiff we consider it unnecessary to decide, inasmuch as the judgment of the court was correct, independently of the rulings complained of. In the first place, after the court had sustained plaintiff's objection to the testimony of the defendants as to their good or bad faith in the transactions complained of, the plaintiff withdrew, in open court, his objections to such testimony, and stated that the same might be admitted without objection, but the defendants declined to avail themselves of such withdrawal and refused to call any witness, and it is evident from the record that they preferred to save their exception for appeal, rather than to have the defendants heard as witnesses in the case. We must hold that appellants waived the alleged error of which they are now complaining.

In the next place, it was not necessary to the judgment which was rendered, as the record stood, to decide whether the allegations of the declaration were admitted by the pleadings or not. They were established by the proof which had been adduced by the plaintiff, and the propositions held as law on that branch of the case being correct, judgment for plaintiff necessarily followed, unless, indeed, the contracts and dealings between the parties involved in the suit were, under the laws of this State, illegal and void, as now contended by appellants. And this brings us to that feature of the case,—that is to say, the appellants contend in this court, that by the contracts and dealings between the parties it was not contemplated that the shares of stock purchased by the defendants for the plaintiff were to be delivered to him, but only that settlements should be made upon the basis of differences between the contract and the market prices;
or, that the parties were dealing in options and their con-
632 tracts were gambling contracts, in violation of the law and public policy of this State, and that no recovery can be had on any matter arising out of them. The record gives no hint, by pleading, evidence or propositions of law, that this question was raised or sought to be raised in the trial court, and it is approached in this court by both parties with great caution and evident reluctance. While it is doubtless true that the parties to a cause cannot, by act or omission of their own, compel courts of justice to enforce contracts, or supposed rights growing out of contracts, which are forbidden by law, and while courts may, for the preservation of their own dignity and for the public welfare, compel investigation in that regard before deciding the cause (Oscanyan *v.* Arms Co., 103 U. S. 261; Wright *v.* Cudahy, 168 *id.* 86); still, we are unable to see how we can on this record pass on the question here as one of law. If the question, though not mentioned in the record, might be considered as embraced in some of the general propositions of law asked by the defendants but refused by the court, it is sufficient to say that there was some evidence on the part of the plaintiff tending to prove that he purchased the stock for delivery to him, and not the mere option to buy or sell it. But what the status of the case would have been had a full defense been made or had this question been fully investigated, cannot, of course, now be known.

Appellee, by cross-errors assigned, attempts to question the amount of damages allowed him by the trial court. He insists that the court adopted a wrong theory in the assessment of damages,—that is, allowed him the value of the stock at the time he demanded it, instead of its higher value when it was fraudulently sold and converted. Counsel have not pointed out, and we have been unable to find from the record, how this question, as one of law, is presented to this court. The trial court was not asked to hold any proposition as law in the case respecting it. It does not appear from remarks of the court embodied in the bill of exceptions that the court expressed his views on the proper measure of damages, but nothing appears to show that he carried these views into his findings or judgment.

Finding no material error, the judgment must be affirmed.

Judgment affirmed.

633 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Appellants in the Supreme Court of Illinois and Plaintiffs in Error in the Supreme Court of the United States,

vs.

JOHN E. BURKE, Appellee in the Supreme Court of Illinois and Defendant in Error in the Supreme Court of the United States.

Now comes the said Richard C. Crawford and Edward A. Valentine, appellants in the supreme court of Illinois and plaintiffs in error in the Supreme Court of the United States and present their petition for writ of error, assignment of errors and bond on writ of error in the sum of fifteen thousand dollars ($15,000.) which bond is approved and said writ of error allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein.

March 2, 1903.

BENJAMIN D. MAGRUDER,
Chief Justice of Supreme Court of Illinois.

634 And afterwards, to-wit: on the day and date last aforesaid there was filed in the office of the clerk of said court a certain bond, which said bond is in the words and figures following, viz:

STATE OF ILLINOIS:

In the Supreme Court.

RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Appellants in the Supreme Court of Illinois, Plaintiffs in Error in the Supreme Court of the United States,

vs.

JOHN E. BURKE, Appellee in the Supreme Court of Illinois, Defendant in Error in the Supreme Court of the United States.

Know all men by these presents, that we, Richard C. Crawford and Edward A. Valentine, both of the city of Chicago, county of Cook and State of Illinois, as principals, and Sarah L. Crawford, and Edward H. Valentine, of said city, county and State, as sureties, are held and firmly bound unto the above named John E. Burke, in the sum of fifteen thousand ($15,000) dollars, to be paid to the said John E. Burke, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 2nd day of March, 1903.

Whereas, lately in the circuit court of said county of Cook and State of Illinois, in a suit pending in said court, between the said John E. Burke, plaintiff, and the said Richard C. Crawford and Edward A. Valentine, defendants, a judgment was rendered against the said Richard C. Crawford and Edward A. Valentine on the fourteenth (14th) day of February, 1901, in the sum of nine thousand six hundred ninety 20/100 ($9,690.20) dollars, together with the said plaintiff's costs and charges, and

Whereas, the said Richard C. Crawford and Edward A. Valentine prayed for and obtained an appeal to the appellate court within and for the first district of said State, and

635 Whereas, the said appellate court did on the second (2nd) day of July, 1902, affirm the judgment of the circuit court aforesaid, and did render judgment against the above bounden for costs of suit from which order of affirmance and judgment of the said appellate court the said Richard C. Crawford and Edward A. Valentine prayed for and obtained an appeal to the supreme court of the State of Illinois, and

Whereas, the said supreme court of the State of Illinois did on the eighteenth (18th) day of February, 1903, affirm the judgment of the circuit and appellate courts with costs of suit, and the said Richard C. Crawford and Edward A. Valentine, having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court of the State of Illinois to reverse the judgment rendered therein, as aforesaid, and a citation directed to the said John E. Burke, citing and admonishing him to be and appear at a Supreme Court of the United States of America, in the city of Washington and District of Columbia;

Now therefore, the condition of this obligation is such that if the above named, Richard C. Crawford and Edward A. Valentine shall prosecute their writ of error to effect and answer all damages and costs, if they shall fail to make their plea good, then this obligation to be void; else to remain in full force and virtue.

RICHARD C. CRAWFORD. [SEAL.]
SARAH L. CRAWFORD. [SEAL.]
EDWARD A. VALENTINE. [SEAL.]
EDWARD H. VALENTINE. [SEAL.]

Signed, sealed and delivered in presence of
CHAS. E. VORMAN.
EDWARD O. BROWN.

Approved March 2nd 1903.
BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of the State of Illinois.

Approved to operate as a supersedeas March 2nd 1903.
BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of the State of Illinois.

636 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

RICHARD C. CRAWFORD and EDWARD A. Valentine, Appellants, vs. JOHN E. BURKE, Appellee. } No. 2689 in the Supreme Court of Illinois.

Assignment of Errors.

On this 2d day of March A. D. 1903, came the plaintiffs in error in the Supreme Court of the United States, Richard C. Crawford and Edward A. Valentine, being the appellants in the supreme court of Illinois and the defendants in the circuit court of Cook county, Illinois in an action brought by John E. Burke as plaintiff against them as defendants by their attorneys, Edward O. Brown and Charles E. Vroman and say that in the records and proceedings in said cause in the supreme court of Illinois there is manifest error in this, to-wit:

1st. The said supreme court of Illinois erred in affirming the said judgment in said cause of the appellate court of the first district of Illinois which affirmed the judgment in said cause in favor of the plaintiff rendered by the circuit court of Cook county.

637 *2nd.* The supreme court of Illinois erred in not reversing the judgment of the appellate court of the first district of Illinois which affirmed the judgment of the circuit court of Cook county in favor of John E. Burke against the said Crawford and Valentine in the aforesaid cause.

3rd. The said supreme court of Illinois erred in rendering a judgment for costs in the said supreme court in favor of the said John E. Burke as against the said Richard C. Crawford and Edward A. Valentine the appellants in said cause.

4th. The said supreme court of Illinois erred in not rendering a judgment for costs against the said John E. Burke in the said cause and in favor of the said Richard C. Crawford and Edward A. Valentine, appellants in said cause.

5th. The said supreme court of Illinois erred in not holding that the discharge in bankruptcy proven by the said Crawford and Valentine, plaintiffs in error, in said cause to have been granted to them during the pendency of said cause was a bar to the said action of the said John E. Burke against them.

6th. The said supreme court of Illinois erred in not holding that the discharge in bankruptcy proven by the plaintiffs in error, the said Richard C. Crawford and Edward A. Valentine, in said cause to have been granted to them during the pendency of said cause was a legal defense to said action.

638 *7th.* The said supreme court of Illinois erred in not holding that the twenty-one several assignments of error signed by the appellants as error in the proceedings of the appellate court of the first district which were well assigned, and therefore erred in not reversing said judgment of John E. Burke against the said Richard C. Crawford and Edward A. Valentine, or in not reversing said judgment and remanding said cause to the circuit court of Cook county.

8th. The said supreme court of Illinois erred in not holding that in said cause certain propositions of law submitted by said John E. Burke, being the plaintiff, in the circuit court of Cook county and the plaintiff in the appellate court of the first district and in the supreme court of Illinois, and each of them to the circuit court of Cook county and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, should not have been held by the circuit court of Cook county, and therefore erred in affirming the judgments of the appellate court of the first district of Illinois and of the circuit court of Cook county in said cause.

9th. The said supreme court of Illinois erred in not holding that the said circuit court of Cook county erred in not refusing to hold as a matter of law certain propositions of law and each of them submitted by the defendants in said circuit court, the appellants in the supreme court of Illinois, Richard C. Crawford and Edward A. Valentine in said cause to said circuit court, viz: the propo-

639 sitions submitted to the said circuit court of Cook county by said defendants in said court, the appellants in the supreme court of Illinois and the plaintiffs in error in the Supreme Court of

the United States, numbered 1, 2, 3, 4, 5, 6, 7, 8, 11, 12 and 13 and the said supreme court of Illinois erred therefore in affirming the judgment of the appellate court of the first district of Illinois and the circuit court of Cook county, Illinois in said cause.

10th. The said supreme court of Illinois erred in not holding that the said circuit court of Cook county erred in finding the issues in said cause for the plaintiff, and therefore the said supreme court erred in affirming the said judgment of the said circuit court and of the appellate court of the first district of Illinois in the affirmance of said judgment of said circuit court.

11th. The said supreme court of Illinois erred in not holding that the circuit court of Cook county erred in not finding the issues in said cause for the defendants and therefore the said supreme court of Illinois erred in affirming the said judgment of the said circuit court of Cook county and of the appellate court of the first district of Illinois.

12th. The said supreme court of Illinois erred in not holding that the circuit court of Cook county erred in refusing to admit proper and competent evidence offered by the said defendants in said circuit court, the appellants in the supreme court of Illinois and the plaintiffs in error in the Supreme Court of the United States, and therefore the said supreme court erred in affirming the judg-
640 ment of said circuit court of Cook county and of the appellate court of the first district of Illinois.

13th. The said supreme court of Illinois erred in not holding that the circuit court of Cook county erred in refusing to set aside its findings upon motion of the defendants in said circuit court and therefore the said supreme court of Illinois erred in affirming the said judgment of the circuit court of Cook county and the judgment of the appellate court of the first district of Illinois in affirming the same.

14th. The said supreme court of Illinois erred in not holding that the circuit court of Cook county erred in refusing to grant a new trial of the said cause upon the motion of the defendants in said circuit court and therefore the said supreme court of Illinois erred in affirming the said judgment of the said circuit court of Cook county and the appellate court of the first district of Illinois in affirmance of the same.

15th. The said supreme court of Illinois erred in not holding that the findings and judgment in said circuit court of Cook county in said cause were against the law and the evidence and therefore the said supreme court erred in affirming the said judgments of the circuit court of Cook county and the said appellate court of the first district of Illinois in affirmance of the same.

16th. The said supreme court of Illinois erred in not holding that no recovery on the facts proven could be had by the plain-
641 tiff in the circuit court in this form of action and therefore the said supreme court of Illinois erred in affirming the said judgment of the circuit court of Cook county and the said appellate court of the first district of Illinois in affirmance of the same.

17th. The said supreme court of Illinois erred in not holding that the contracts and dealings between the parties hereto, out of which arose the demand of said John E. Burke against the said Richard C. Crawford and Edward A. Valentine, asserted herein, were gambling contracts and transactions in violation of law and public policy, and hence that such demand is not recoverable.

Wherefore the plaintiffs in error, the said Richard C. Crawford and Edward A. Valentine, pray that the said judgment of the supreme court of Illinois and of the judgment in said cause of the circuit court of Cook county and of the appellate court of the first district of Illinois may be reversed and in all things set aside.

EDWARD O. BROWN,
Of Peckham, Brown & Packard,
CHARLES E. VROMAN,
Of Musgrave, Vroman & Lee,
Attorneys & of Counsel for Plaintiffs in Error.

642 UNITED STATES OF AMERICA, ss:

In the Supreme Court of the United States.

RICHARD C. CRAWFORD and EDWARD A. VALENTINE, Plaintiffs in Error,
vs.
JOHN E. BURKE, Defendant in Error.

Writ of error to the supreme court of Illinois.

And now come the plaintiffs in error by Edward O. Brown, their attorney and counsel and under section nine, rule ten of the Supreme Court, declare that they rely upon the assignment of errors filed with the transcript of record in said above entitled cause, and for printing designate the following parts of the record:

The whole record from the beginning up to and including page 470; also pages 546, 547 and 548; also, pages 568 to the end of the record;

To express the matter differently, I would say that plaintiffs in error would desire the whole record as filed printed EXCEPT pages 471 to 545 inclusive and pages 549 to 567 inclusive.

These excepted pages are transcripts of ledger accounts in the books of Crawford & Valentine, called,

Account of R. C. Crawford;
Account of R. C. Crawford No. 2;
Account of R. C. Crawford No. 3;
643 R. C. Crawford New York account;
Account E. A. Valentine;
Account E. A. Valentine No. 2;
Stock & bonds account;
Stanley & Crawford account;

Stanley & Valentine account;
P. E. Stanley account;
J. T. Kilgour account;
Crawford & Valentine grain account;
J. R. Wilkins account;
Wilkins, Hodson & Co. pool account;
I. Hodson, Jr. account;
I. Hodson, Jr. No. 2 account;
I. Hodson, Jr. No. 3 account;
I. Hodson, Jr. special account;
Hodson & Salisbury account;
Baldwin & Farlin account;
Dick Bros. & Co. No. 2 account;
Bills payable account;

and also transcripts of cash book accounts of Crawford & Valentine, called,

Capital, assets & liabilities account;
Assets and liabilities of Valentine & McAvoy;

and transcripts ledger accounts,

Dick Bros. & Lawrence,
Dick Bros. & Rae.

All the rest of the record the plaintiffs in error designate for printing.

The plaintiffs in error have served a copy of this statement and designation upon John E. Burke, defendant in error, and file proof of service upon him herewith.

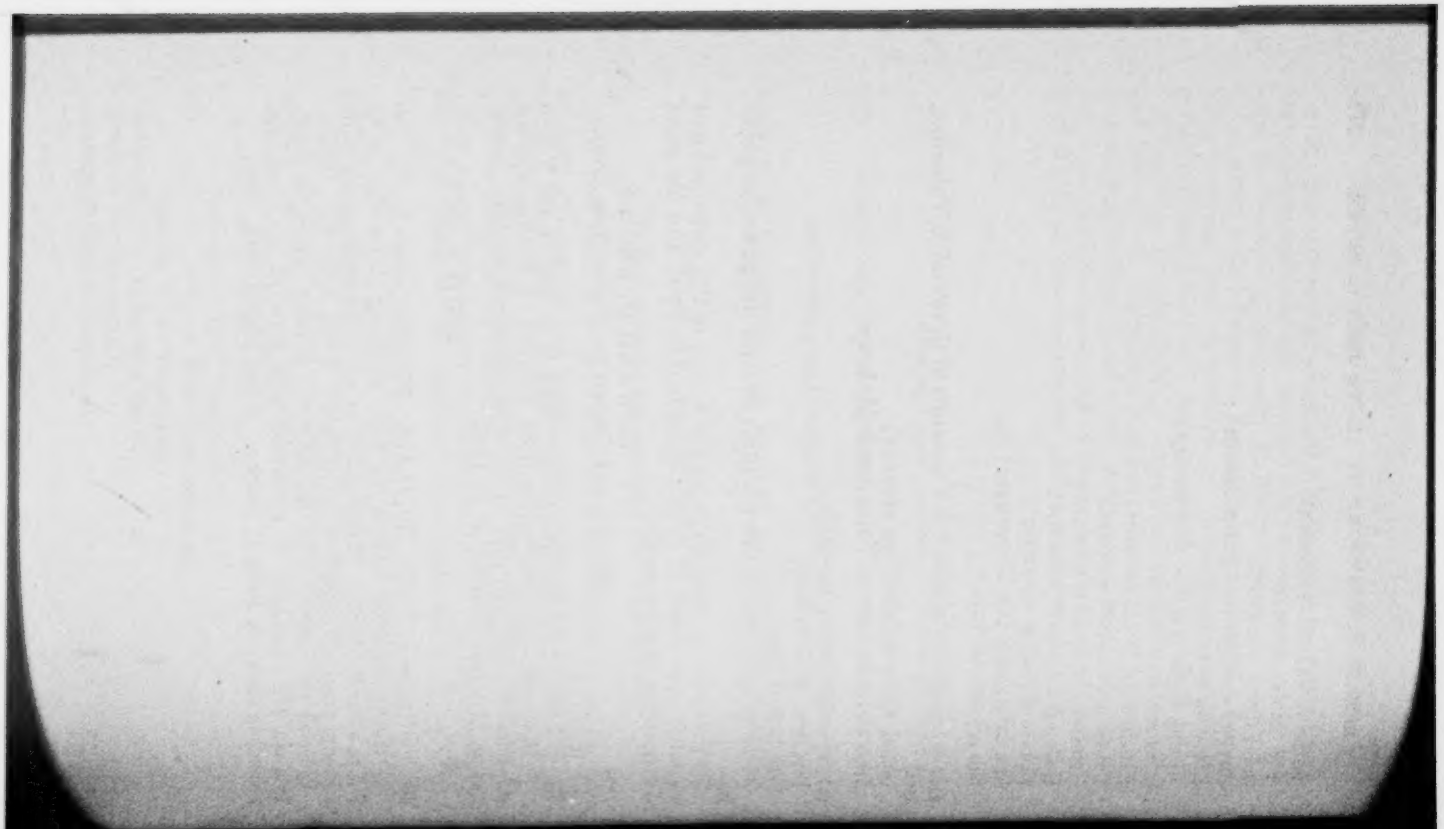
EDWARD O. BROWN,
Attorney and Counsel for Plaintiffs in Error.

644 I hereby acknowledge the receipt of a copy of the within statement and designation from Edward O. Brown, solicitor and counsel for the plaintiffs in error in the above entitled cause, upon the 21st day of April, A. D. 1903.

JOHN E. BURKE.

645 [Endorsed:] File No. 18,878. Supreme Court U. S. October term, 1902 Term No. 650. Richard C. Crawford *et al.* P. E. vs. John E. Burke. Statement of errors & designation by pl'ffs in error of parts of record to be printed. Filed April 25", 1903

Endorsed on cover: File No. 18,878. Illinois supreme court. Term No. 247. Richard C. Crawford and Edward A. Valentine, plaintiffs in error, vs. John E. Burke. Filed March 26th, 1903.



FILE COPY.

IN THE

Supreme Court of the United States

October Term, A. D. 1902.

No. 312

RICHARD C. CRAWFORD and EDWARD A. VALENTINE,
Plaintiffs in Error,

vs.

JOHN R. BURKE,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

CHARLES F. VROOMAN
GEORGE PACKARD
HARRISON MUSGRAVE
Attorneys for Plaintiffs in Error.

(See Printed on Reverse Page)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 247

RICHARD C. CRAWFORD and EDWARD A. VALENTINE,
Plaintiffs in Error,
vs.
JOHN E. BURKE,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

The jurisdictional ground upon which this case comes before this court on error to the Supreme Court of the State of Illinois is the Federal question involved in the interpretation of Sections 17 and 63 of the Bankruptcy Act of 1898. Whether, in fact, the claim upon which judgment was rendered against plaintiffs in error was a "provable debt," which their plea of discharge in bankruptcy bars, is the question at issue; it is a mooted question of far-reaching moment, that has never before reached this tribunal, and

demands careful attention apart from its determining force and application in the case at bar.

We are well aware that this court on a writ of error to a state court has usually held that questions of fact upon which the state courts have passed, are not open for review here. That is unquestionably the ordinary rule, and will dispense with a discussion of the law as applied to such facts in many phases that were bitterly contested through the various courts below, to the conclusions of which courts thereon we must respectfully bow. But, as will be seen, we must, in the nature of the Federal question involved, re-examine most, if not all, of the evidence, in this record. The point of law involves in its very nature this review. Was there not error in holding as naught the discharge in bankruptcy pleaded below, in view of the pleadings and the facts disclosed by the record? That is the question, which clearly involves the application of what was said by this court in *Dower* v. *Richards,* 151 U. S., 658.

> "Where, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court."

But there is another, and peculiar reason, why, in the interests of justice this court should consider the facts of this particular case. And that is, that the facts have *never* been actually passed upon fully by any court, and not at all by any of the courts of review. The case was tried in the first instance, by the court, without the intervention of a jury. At the conclusion of the plaintiff's case, Mr. Crawford, one of the plaintiffs in error, was called to the stand, to rebut certain presumptions of fraud that the

defendant in error had tried to raise relating to the books of the firm—for the purpose of showing that the debt was not fraudulently contracted. The plea of discharge in bankruptcy was a plea *puis darrein continuance*. The court refused to allow the defense to proceed, on the ground, erroneous as we believe, that the plea *puis* waived all defenses, and only the discharge could be shown in evidence. The court rendered judgment on this theory against the plaintiffs in error, having before it only the vital question whether the facts disclosed that the debt claimed in the declaration was in substance and in truth a debt that a discharge in bankruptcy would not bar. *On the next day* indeed defendant in error attempted to withdraw his objection to the defendants putting in their case—but the case had closed. The judgment was for $9,690, but only, as we have seen, on a one-sided presentation of the evidence.

An appeal was then taken to the Appellate Court of the First District of Illinois. By a singular fatality, one of the three justices of the court while sitting below at *nisi prius*, had, at one time in an early stage of the case, had a branch of it before him, and consequently refused to sit upon it on appeal. The other two justices *failed to agree*, and a *per curiam* opinion was rendered (102 Ill. App., p. 566), briefly outlining the points involved, and stating that "Many of the questions thus involved are important and not easy of decision," and that the remaining justices "are unable to agree on the main questions involved," and concluding, "The judgment therefore stands affirmed."

This, under the Illinois practice, was the last tribunal before which under ordinary circumstances the facts could by any possibility be at all considered. On appeal to the

Supreme Court of Illinois, that court held (201 Ill., p. 581) (Abst., 265-271) that the case did not, as we had contended it did, come to it precisely as it went to the Appellate Court:

> "The judgment of the Appellate Court is as conclusive upon all controverted questions of fact in this case as in any other, notwithstanding the recitals in the judgment of affirmance showing the disagreement between the two judges who considered the case in that court. The statute makes no exception of such a case. We must regard all questions of fact as settled against appellants, and this includes all inferences of fact arising from facts actually proved."

This is a particularly hard and unfortunate cumulation of circumstances, and the case now comes before this tribunal on the Federal question involved without ever having the facts discussed by a court of review, and with only one side presented before the court of original jurisdiction. We do not urge this in the expectation that this court will depart from its established procedure; but we do submit that the utmost indulgence possible should be extended in considering the record in its legal effect and as bearing upon the federal question involved. With this explanation we proceed at once with our statement of the case.

STATEMENT.

On the 20th of May, 1895, the firm of Crawford & Valentine, composed of the defendants, Richard C. Crawford and Edward A. Valentine, who had been doing a large speculative business as stock-brokers in the city of Chicago, failed, as the result, so it was alleged in the subsequent proceedings between the partners, of heavy losses in speculations upon the Board of Trade in Chicago and elsewhere by one of the partners. (See Abst., 226.) At all events, the assets which were good seemed to be much less than the liabilities. A receiver of the partnership was appointed (the Chicago Title and Trust Company) upon a bill brought by one of the partners against the other, which prayed that such a receiver should be appointed to take possession of the assets of said copartnership and convert the same into money, and out of the proceeds thereof distribute the same ratably among the creditors of said copartnership. The final result was the payment on May 5, 1896, of 15 per cent only of the liabilities of the firm as a dividend upon such liabilities as were proven. (Abst., 175.)

It especially behooves those people who are engaged in the business of stockbrokers to remain solvent. If they would keep a shred of reputation with the persons who deal with them they must not be unfortunate in their business or become loaded down with bad debts or in any way fail to keep their obligations, for views, aspects and standpoints of the business relations between customers and brokers change with chameleon-like rapidity, when the broker becomes insolvent. As we shall attempt to point out hereafter, legal fictions then become established truths, which it is heresy to deny. Even in the great financial centers

where the stockbrokerage business is most legitimately carried on and where actual certificates of stock to the amount of millions upon millions of dollars pass from hand to hand every day, there never was a failure of stockbrokers where charges and counter-charges of criminality, embezzlement and fraud were not freely bandied about.

Naturally, therefore, in the present case, where the plaintiffs in error were doing a large business in Chicago, in eastern securities necessarily through New York and Philadelphia correspondents, securities which could only be bought or sold in such distant states through foreign brokers by wire and "carried" in such states and by such brokers for the plaintiffs in error here, there was a confusion and hotch-potch of claims and interests which inevitably resulted in an outcry of this kind. Each creditor became possessed of an idea that he could in some way so solve the knotty legal problems which are involved in the relations of stockbrokers and their customers and their correspondents that he could "attain the unattainable and catch the uncatchable," that is, that he could in some way distinguish and identify stock and certificates of stock in which he was interested from the general assets of the firm by asserting the misappropriation or conversion of some particular stock, or accomplish in an indirect way the same result by forcing the friends of the young men in question to pay their indebtedness under the threat of a judgment on which a capias could be issued and imprisonment result.

The young men had saved nothing from the wreck and some creditors (reduced, finally, however, only to the defendant in error) pressing them with unrelenting acrimony and persistency, they took the benefit of the Federal Bankruptcy Act and were on the 5th day of April, 1900, discharged "from all debts and claims which are made provable

by said act against their individual and copartnership estates, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." (Abst., 232.)

This present suit, one of the results or *sequelae* of the failure in 1895, was begun in case by the plaintiff on July 30, 1897, against the defendants, Crawford & Valentine, and a declaration of ten counts (printed in full in the abstract, 7-23) was filed. Of these ten counts five were framed on the theory that certain stock belonging to the defendant had been "converted," the skeleton of each count being about this:

> "John E. Burke, plaintiff, complains of Richard C. Crawford and Edward A. Valentine, defendants, in a plea of trespass on the case, for that Whereas, on, etc., the said defendants, were stockbrokers * * * and Whereas the said plaintiff * * * had retained and employed the said defendants as the brokers and agents of the said plaintiff to buy, hold and carry stocks for and on account of the said plaintiff and subject to said plaintiff's orders for reward to said defendants * * * and said defendants accepted * * * said employment, and, Whereas the said plaintiff * * * caused to be delivered to and placed in the control of the said defendants as the brokers, agents and pledgees of the said plaintiff.....shares of the stock of the Metropolitan Traction Company, to be held as a pledge and to be carried and kept on hand by the said defendants for and on account of the said plaintiff, and subject to the orders of the said plaintiff, and for and as a pledge and security to the said defendants for the payment to them by the said plaintiff of the sum of .....dollars loaned and advanced or caused to be loaned and advanced by the said defendants to the said plaintiffs, and the said defendants on the day and year last mentioned accepted and received the said.....shares of stock for the purposes aforesaid, and thereupon it became and

was the duty of the said defendants as such pledgees and as the brokers and agents of the said plaintiff to hold, carry and keep on hand the said ..... shares of stock for and on account of the said plaintiff and subject to the orders of the said plaintiff; yet the said defendants, not regarding their duty in that behalf, but contriving and intending to injure and defraud the said plaintiff in this behalf, afterwards, to-wit, on, etc., wrongfully, wilfully and fraudulently and without the knowledge or consent of the said plaintiff and without requiring payment of said loan and without any notice to the said plaintiff whatever, sold, delivered and disposed of all the said .....shares of stock of the said plaintiff * * * and then and there wilfully and fraudulently and with intent to injure, cheat and defraud the said plaintiff, converted the said shares of stock and the proceeds of the sale thereof and plaintiff's reversionary interests to the said stock to their own use, by means whereof the said..... shares of stock and the proceeds of sale thereunder and plaintiff's reversionary interest in said stock, were wholly lost to said plaintiff."

The other five counts were framed as claims for money obtained by false and fraudulent representations.

To all of these charges the defendants filed pleas of the general issue (not guilty) on September 20, 1897. To these similiters were filed by the plaintiff (Abst., 24-25). After obtaining their discharge in bankruptcy, on April 5, 1900, the defendants filed (on April 12, 1900) notice of special matter (to-wit, their discharge in bankruptcy), which they proposed to give in evidence under the said pleas of the general issue. The plaintiff objected to leave being granted to file this special notice, but it was granted over his objections. (Abst., 26-27.)

On January 3, 1901, by leave of the court (but without withdrawing or waiving any plea or other matter heretofore

filed, unless by operation of law it was so waived or withdrawn) each of the defendants filed a special plea setting up his discharge in bankruptcy, and alleging that "the said supposed causes of action are not nor is any one of them in respect to any such debt or debts as are or is by said act excepted from the operation of a discharge in bankruptcy."

To this the plaintiff replied that his demand is of such a character as brings it within the class of debts excepted from the operation of the Bankruptcy Act, and hence that it is not barred by appellant's discharge.

On the issues by these pleadings framed, the cause came to trial before Judge Dunne in the Circuit Court without a jury on January 30, 1901. The plaintiff offered a large amount of evidence, including his own very extended testimony, giving in detail the history of his transactions with the defendants, two long depositions taken in Philadelphia of stockbrokers there who were connected with said dealings, according to the plaintiff's theory of the case, the deposition of William E. Kent, who had been connected with them here, the testimony of two persons connected with the Chicago Title and Trust Company the receiver appointed in the suit of *Valentine* v. *Crawford* at the time of the failure, the testimony of a professional accountant and of the plaintiff's former confidential legal adviser, besides documentary evidence from the defendants' books, etc., the latter alone making about one hundred and fifty pages of the record. In all there were over four hundred and fifty pages of evidence offered by the plaintiff, all of which has been duly and fully abstracted. When the plaintiff rested, the defendants' counsel offered Mr. Crawford, one of the defendants, as a witness to prove that the debt for which the plaintiff was suing the defendants was not fraudulently contracted. But the court held (Abst., 231-232) that we could

not introduce such evidence, presumably because we had specially pleaded the discharge in bankruptcy, which had occurred after issue joined, and had thereby become subject to the rule laid down in *Mount* v. *Scholes,* 120 Ill., 394, that by pleading *puis darrein continuance* we had waived all other defenses, and that the material allegations of the plaintiff's declaration must be considered as admitted and could not be denied by us. This ruling he afterwards confirmed by holding, and marking "Held," various propositions of law, marked from 11 to 20, offered by the plaintiff (Abst., 241-242) in which it is asserted as to each of the ten counts of the plaintiff's declaration, "that all the material allegations of matters of fact contained in the said count of the plaintiff's declaration stand as admitted on the pleadings and that the defendants' discharge in bankruptcy is not a legal defense to the plaintiff's claim for such damages, if any, as he may have sustained by reason of the matters alleged in said count." The court must also have held "that the material allegations" of the plaintiff's declaration included the assertions in the first five counts that it was "contriving to injure and defraud the plaintiff and wilfully and fraudulently and with intent to cheat and defraud said plaintiff" that the defendants "converted" certain "stock" and "proceeds of the sale thereof" and "plaintiff's reversionary interest in said stock to their own use," since he refused to allow us to prove that the debt was not fraudulently contracted. Similarly he must have held that as to the last five counts the "material allegations" of these counts included the assertion that it was "contriving and intending to cheat, deceive and defraud the plaintiff," that the defendants represented that they were holding and carrying for and on account of the said plaintiffs certain shares of stock and were required to keep certain margins

in Philadelphia upon the same; but this last proposition would seem to us of little consequence, for although the court below held that we admitted these allegations, he also held (Abst., 245) the fourteenth proposition of law submitted by the defendants, to the effect that the plaintiff could not recover on the first five counts of his declaration and also on the remaining counts of the declaration or, in other words, that a recovery on the first five counts would bar a recovery on the remaining five counts. By his opinion (Abst., 245) he said he gave judgment for the plaintiff because he had reached the conclusion that there was a "conversion" of the "reversionary interest" in the stock, and that the plaintiff had "a right to recover in trover." In other words, he held as this court or any other court in its senses must hold, that if we were liable for the conversion, we could not be also liable for a fragmentary portion of the price of the stock, according to the plaintiff's own theory. If there would seem to be an inconsistency in holding that we had admitted these allegations and holding at the same time that we could not be liable upon them, it is due to the marked absurdities into which adherence to legal fictions and technicalities (such as the rule concerning pleadings *puis darrein continuance*, may lead the clearest minded judge.

We take issue with the plaintiff in these things: We assert:

First. There is nothing admitted by our pleadings. The doctrine of *Mount* v. *Scholes* has no application to this cause.

Second. If anything is admitted by the special plea of discharge in bankruptcy, as a plea *"puis darrein continuance,"* it is *not* these allegations of fraudulent intent in

the first five counts, which are, as we insist, on reason and authority (hereafter to be cited) neither material nor traversable.

These two issues raised questions of reversible error at once, and at the threshold of the case, though perhaps not open to review in this court.

The case being then submitted with practically no evidence on the part of the defendants but the discharge in bankruptcy, the court found that the debt declared on was not dischargeable in bankruptcy, and gave judgment for the plaintiff for $9,690 and costs.

We assign as error the giving of any judgment at all, even on the case alleged and made by the plaintiff, with the evidence concerning the character of the transactions offered by the defendants excluded.

First. Because even if the debt were one incurred by positive fraud, involving moral turpitude, and intentional wrong-doing, it had not been reduced to judgment before the discharge of the defendants in bankruptcy, and the undischargeable debts in bankruptcy do not include debts that were created by fraud unless (a) they have been reduced to judgment or (b) they were created by the defendant while acting as an officer or in a fiduciary capacity which it is admitted these defendants were not.

Second. Because as shown by the plaintiff's own evidence, by which he construed his own declaration, the indebtedness shown by the plaintiff to have existed is also shown not to have been one resulting from "positive fraud involving moral turpitude" as distinguished from implied or constructive fraud or fraud in law.

Thus the main issues on our assignments of error raised in this writ of error are two:

First issue: On the legal effect of a discharge in bankruptcy upon any debt created by fraud even positive in its character involving moral turpitude, unless said debt has been reduced to judgment or unless the fraud was committed while the defendant acted as an officer or in a fiduciary capacity (which the plaintiff below disclaimed any intention of charging that these defendants were doing).

Second issue: In the character of the case alleged and made by the plaintiff so far as its involving positive fraud and moral turpitude is concerned. Unless there was positive fraud as distinguished even from constructive fraud or fraud in law, the plaintiff himself admits the validity of our discharge in bankruptcy.

It is only on the first issue as we have above indicated, that the history and nature of the dealings between the plaintiff and the defendants become involved, but since in it it is involved, it is necessary to make clear here in the statement our position in regard to them. We should have preferred in this statement not even to have suggested an argument of the case, but it is impossible to state clearly the questions at issue between the opposing parties in this law suit, without giving the theories concerning the same state of facts which those parties and their counsel respectively hold, and we shall not therefore endeavor to do so; and this necessarily implies, to some extent, an argumentative statement.

The dealings and transactions between the plaintiff and defendants, as we understand them, were these:

Prior to July 1, 1894, the plaintiff (defendant in error) who was a lawyer in Chicago, formerly assistant United States district attorney, had been dealing or speculating in

stocks of various kinds through the firm of Valentine & McAvoy, a firm of stockbrokers in Chicago, composed of one of the defendants and a third person not interested in the present suit, named McAvoy (Abst., 37). On the 1st of July, 1894, the new firm of Crawford & Valentine was formed as successors to Valentine & McAvoy, and the "account" of the plaintiff was transferred to the new firm. Among the stocks in which Burke had been speculating through Valentine & McAvoy and of which he had a credit on the books of Valentine & McAvoy, was "Metropolitan Traction" stock at New York, being stock of the par value of $100 a share, of a street railway corporation in New York City. (Abst., 38.) The stock was not listed at that time anywhere on stock exchanges, although afterwards listed in New York, but Philadelphia was practically the only market for it. Practically never a certificate of a share of it was held or seen in Chicago, and Chicago people who speculated in it simply gave orders to Chicago brokers to buy or sell for them so many shares of Metropolitan Traction, and the Chicago brokers ordered their Philadelphia correspondents to buy or sell so many shares for them (the Chicago brokers) account, never revealing the name of their principals and hardly ever handling a single certificate of stock (Abst., 137-138), but carrying on, on the one hand, a book account with their customer or client in Chicago in relation to this stock, and, on the other hand, a book account with their correspondents in Philadelphia, in relation to this stock and other speculative and investment securities of New York, Philadelphia and Chicago companies. The book account of this character which Valentine & Crawford as Chicago brokers had with their Philadelphia correspondents, Dick Bros. & Co., and Toland Bros. & Co., included and were connected with their dealings for other

customers besides Burke and also for themselves. (Abst., 133-134.) It is here that the contention and difference between us and the plaintiff on questions of motive and intention take their origin. The plaintiff contends that because of transactions which we regard as regular, legitimate and customary, indeed practically inevitable, if a stock brokerage business in Chicago dealing with eastern securities is to be carried on at all (transactions which are open to criticism as we think, if at all, only on a subsidiary and unessential question of the professional ethics of stock dealing, which discourage a broker's personally trading in the same kinds of stocks which customers are buying or selling through him), stock actually belonging to the plaintiff was fraudulently converted to the personal use of the defendants, and that money which we regard as properly paid by the plaintiff to the defendants as "margins" so-called according to the usage and custom of the trade, having regard to the contract between the defendants and the plaintiff and the market price of the stock, was as a matter of fact obtained from the plaintiff by the defendants by false and fraudulent representations as to the stock which the defendants had "on hand." At all events whatever the relations of the plaintiff were with Valentine & McAvoy they continued to be with Crawford & Valentine. (Abst., 38.) The plaintiff, by what we regard as a pure legal fiction, originally invented by the New York Court of Appeals as a usable hypothesis (like some of the tentative propositions of the higher mathematics) from which to work out rights and remedies in a particularly knotty class of cases, chooses to regard the defendants as coming on the 1st of July, 1894, into the possession and control of certain certificates of Metropolitan Traction stock of which he, the plaintiff, was the owner, and on which they, the defendants, had loaned him money. We, on the other hand (believing

that we are holding to the real truth of things and avoiding legal fictions), hold that on that day Crawford & Valentine simply assumed a contract which Valentine & McAvoy had previously made with Burke by which they, Crawford & Valentine, held themselves liable to have on hand, or to obtain it if they did not then have it, at any time at which they might be ordered by the plaintiff to deliver it to him or to his vendee on his order, a certain amount of Metropolitan Traction stock or else to respond in a money settlement for such profits as the plaintiff could make by any such sale. The contract on the part of Burke, the plaintiff, was, to give the defendants a small commission and interest charge on the amounts nominally involved in the transactions as compensation for their assuming this liability, and also to assure the defendants against loss in case the stock went down in market price. In other words as to 450 shares of Metropolitan Traction stock (which was the amount to the credit of Burke on the books of Crawford & Valentine, when the later began business) (Abst., 38), the defendants and the plaintiff made a contract by which the defendants agreed for a small commission to be liable for the profit if the stock went up in market price, and the plaintiff agreed to protect the defendants against the loss if the stock went down, and to keep sufficient security in their hands for that purpose at all times. This subsisting contract was varied from time to time by subsequent arrangements between the parties and was partially carried out at various times as demanded by one side or the other. It is to be remembered that most of this time similar contracts were in existence as to other stocks between the plaintiffs and defendants. There was American Sugar Refinery stock under the name of "Sugar" (Abst., 56), Philadelphia and Reading Railroad stock under the name of "Reading," and Chesapeake and Ohio Rail-

way stock under the name of "Chesapeake & Ohio" (Abst., 44), and Chicago Gas Company stock under the name of "Gas," all speculated in by the plaintiff with the defendants just as he speculated in "Met. Trac.," as this Metropolitan Traction stock was known on the exchanges. But fortunately for Burke the contracts in relation to these other stocks were all completed, fully carried out on both sides before the failure of the defendants in May, 1895, so that we have only to occupy ourselves with the contract about the Metropolitan Traction stock in its various phases. Our view of the transactions between Burke and Crawford & Valentine, which involve this contract, is this:

On July 1, 1894, as we have seen, Crawford & Valentine undertook to have on hand or to obtain it, if they did not then have it, at any time at which the plaintiff might order them to deliver it to him or to his vendee and pay them the market price—on the day he made his contract with Valentine & McAvoy—450 shares of Metropolitan Traction stock, and Burke agreed to pay them a small sum on the nominal amount involved if he ordered them to deliver to his vendee, and in any event to protect the defendants against loss by keeping the "deal margined." Thus the contract stood until September 28, 1894, when Burke, by ordering, "in the language of the game," fifty more shares of Metropolitan Traction stock "bought" and Crawford & Valentine, by undertaking the order, extended this "deal" to 500 shares in place of 450—the last fifty shares to be forthcoming on demand and on the payment of the market price of September 28, 1894. (Abst., 38.) So the matter continued until December 20, 1894, when, in pursuance of his part of the contract to keep sufficient security in Crawford & Valentine's hands to indemnify and secure them against loss at all times, Burke gave them $2,000 in cash. (Abst., 42.) On January

11, 1895, in pursuance of the same contract, which was at that time unchanged, he gave them $2,000 more, and on January 25, 1895, Mr. Burke called upon Crawford & Valentine partially to fulfill their part of the contract and to sell for him and to deliver the vendee 300 shares of Metropolitan Traction stock.

They promptly complied. They happened to have more than that amount under their immediate control with their correspondents in Philadelphia, and ordered it delivered out, accounting properly for the transaction in their account with Burke. But it would not, in our view, have altered the nature of the transaction one whit or been any default in the contract on Crawford & Valentine's part, if they had, instead of actually delivering stock which they had under their control in Philadelphia, first bought it for such delivery, or even had they avowedly settled with Mr. Burke on the basis of the market price upon the day he ordered it sold, and credited him and accounted to him in any proper way in their ledger account with him on such basis.

Judge Lowell, in the United States District Court in Massachusetts, in a late case, to be cited and discussed in our argument (*In re Swift,* Federal Reporter, Volume 105, page 493), well shows how "shadowy" and "vague" and "against logic and common sense" is the obligation, brokers themselves are disposed to recognize through a mere "custom of the trade," "to do something," "even before the stock is finally demanded."

On the next day, according to our view (January 29, 1895), a further modification of the existing arrangement was made by Crawford & Valentine. As they had previously assumed the contract which Valentine & McAvoy had with Burke, they assumed one which Jamieson & Co., other stockbrokers of Chicago, had with him, and added an obligation

to account to Burke, when demanded, for 300 more shares of Metropolitan Traction stock, beyond the 200 with which the sale of the day before had left him credited. This made 500 shares again for which they were in this manner accountable to him, and on the same day, in further compliance with his part of the contract, Burke, at Crawford & Valentine's demand, gave them another $1,000 for security or "margin." So the account stood until March 28, 1895, when Burke increased the "deal" by ordering "bought" fifty more shares, making 550 shares of the stock as the matter of account between the parties. The market price of the stock continually falling, Crawford & Valentine demanded still more "margin" as security, to wit, $3,800, which, by the assistance of a friend, Mr. W. E. Kent, Burke was enabled to give them on April 1st. (Abst., 44.)

Three thousand three hundred dollars of this (in accordance with a promise to Mr. Kent, conditioned on the stock going up) they paid back on May 14. (Abst., 46.) On May 20, 1895 (Abst., 50-51) the crash came, and Crawford & Valentine went to the wall. They were at that time, according to our view of the dealings between the parties as above sketched, under a contractual obligation to deliver to Burke, at his demand and on the payment of $44,718.71, 550 shares of Metropolitan Traction stock, the market price of which on that day was $52,181.25. In other words, they were, according to the undertaking which they had made with him on a good and valid consideration which he had carried out, under obligation to give him property worth, on the market, $7,462.54 more than he was obliged to pay them for it. (Rec., 417; Abst., 218; Rec., 470; Abst., 234.)

There is nothing to throw the slightest doubt on the proposition that had this stock been demanded by Burke for himself or for delivery to a vendee, even the day before the

failure, it would have been forthcoming. It is quite true that there was no such stock in the immediate present control of Crawford & Valentine for reasons to be hereafter detailed, but all that this meant to any of the parties to the matter was that Crawford & Valentine would have had to buy it on the Philadelphia exchange—a matter of telegraphing to Philadelphia and a five minutes' transaction there. To have thus procured and delivered the stock would have cost them exactly $7,462.54 over what Burke was obliged by the terms of his contract to pay them, and on payment of that sum to Burke, it goes without saying, he would have been just as well pleased as with the stock itself. For, if, for any reason, he preferred the latter, all that it was necessary for him to do was to add the sum thus paid him to that which he would have been obliged to pay Crawford & Valentine to make himself entitled to the stock, and to send the aggregate to Philadelphia to brokers whom he knew and to get the stock itself.

But on the 20th day of May, what would have been possible to Crawford & Valentine the day before was absolutely impossible. Their true condition had become known to themselves and to the world. The dice were down. The crash had come. Mr. Burke says he did not demand "that the stock be delivered to him and offered to pay the money," but that he went to Crawford & Valentine's office and ordered the stock "sent on from Philadelphia to this place to be taken up here and paid for." (Abst., 51; more fully Rec., 109.) Mr. Kent, his witness, says:

> "I went immediately subsequent to the failure to Crawford & Valentine to their office with John E. Burke, and made a demand for that stock; being prepared at that time to take it up and pay for it." (Abst., 194.)

So, that, despite Mr. Burke's own disclaimer of doing just what it was right and proper for him to have done, we

may assume that he did practically make a demand for 550 shares of Metropolitan Traction stock, and practically declared himself ready to pay the $44,718.71 necessary to entitle himself to it under the contract. Crawford & Valentine then, in our view, for the first time defaulted on their part of the contract and for the first time became liable in any damages or were guilty of any wrong to Mr. Burke. The wrong was only the wrong that any man commits on another when even involuntarily and by misfortune he defaults on a contract with him, and the damages for which they were liable were plainly the difference between what Mr. Burke could buy the stock for on the open market on that day and what he had to pay Crawford & Valentine for it under his contract with them. That amount was $7,462.54. It was this amount with interest for which judgment was given below. It was an indebtedness which existed from Crawford & Valentine to Burke, until, harassed and pursued unrelentingly by the plaintiff in an action in tort, which could have had, as distinguished from an action in assumpsit to which no defense could have been made, no other end or purpose than to imprison the defendants or to induce by fear of it their innocent friends and relatives to pay their debt, they sought and obtained, as we contend, the legal discharge of it in bankruptcy.

Of course the view we have given above of the relations which existed between the plaintiff and the defendants, which makes them purely contractual, is not that which the plaintiff takes. It would undoubtedly have suited him well enough as "a working hypothesis" concerning these relations as long as Crawford & Valentine were solvent and able to live up to the rules of the rather hazardous game that he and they were playing under the more dignified name of "dealing in stocks"; but when they failed it was not un-

natural that legal fictions became with him fixed ideas. He argued himself into the belief that because he had gone to stockbrokers and said "buy me Sugar," "buy me Metropolitan Traction," "buy me Reading," and then after putting up with the brokers as "margins" a small fraction of their value, not more than 10 per cent., had watched the tape and ticker, until he concluded to say "sell Sugar for me," "sell Metropolitan Traction for me," etc., and then had settled with the brokers at the figures which the accounts of the brokers seemed to show the profit or loss to be, he had actually purchased certain stock for investment; had received it; had given it to the brokers as collateral, and had received from them a loan of the unpaid balance due upon it, and that the brokers, therefore, had in their hands certain stock which could be and was the subject of conversion by them and of a suit for trover or conversion by him. How he would have explained the transaction where the sale came first and the purchase afterwards, which quite as often happen in the course of this kind of business, as the other way, we do not know.

But according to Mr. Burke's view of these transactions he had before July 1, 1894, 450 shares of Metropolitan Traction stock in Valentine & McAvoy's hands as security for a very large amount of money (he says $45,948.28 (Abst., 38) which would be within about 10 per cent of its whole value). On July 1, 1894, Crawford & Valentine succeeding to the busines of Valentine & McAvoy, took this indebtedness from Burke and the stock as collateral. (Abst., 38). On September 28, 1894 (Abst., 39), Crawford & Valentine came into possession as property of Burke's, simply in further pledge for an increased indebtedness amounting now to about $52,600, of fifty more shares of Metropolitan Traction stock, and on January 29, 1895 (Abst.,

39) of 300 more on the same conditions, the indebtedness on this last date being increased by $24,000. On March 28, 1895 (Abst., 39) they further came into possession of fifty more shares as a similar pledge, the indebtedness then being increased by about $46,500. On December 20 they took $2,000 as payment on the indebtedness (Abst., 42). On January 11 another payment of $2,000 on the indebtedness (Abst., 42); on January 29 still another payment of $1,000 (Abst., 42); on April 1 a payment of $3,800, of which, however, they afterwards refunded $3,300 to William E. Kent, from whom they took it (Abst., 43). Besides these sums $1,750 was received by Crawford & Valentine as dividends on this stock before May 20, 1895. It is evident that if nothing had been sold from this alleged pledged property in the hands of Crawford & Valentine there would have been at the time of their failure 850 shares of Metropolitan Traction stock belonging to Burke and subject to an indebtedness of say $74,000. Mr. Burke ordered 300 shares, however, sold on January 28, 1895, and they were reported to him as sold, as he declares, and were believed by him to be sold on that day, and the proceeds, $27,000, accepted by him on his account (Abst., 41). If he stood by this transaction it is then evident that he would claim on his theory of the case that on May 20, 1895, he should have had 550 shares Metropolitan Traction stock in Crawford & Valentine's hands, which should have been given him upon the payment by him of approximately $45,000. He says that he offered to pay what was due and demanded then for the stock and did not get it, because, as he then found for the first time, it had been sold without his knowledge or instructions or consent, and that this was practically embezzlement or theft and for the purpose of this suit positively fraudulent conversion. The relations he al-

leges were not contractual, but in fact those of depositor and depositary of personal property. But Mr. Burke does not stop here. He says that this 550 shares which he should have received were converted not all together and not at the time of the failure or just before it, but at such times as to give him a claim for a much larger sum than the difference between the amount of the indebtedness shown by the accounts and the market price upon the date of failure. Thus he says that Crawford & Valentine began by selling 100 shares of his property on October 24, 1894, and that the market price then was $10,925, which should have been credited to him at that time (Abst., 48). That they sold another 100 shares of his stock upon the 10th of January and got $10,075 with which he should be credited, and another 200 shares on January 11 for $20,300 with which he should be credited, and that this left them with but 100 shares of his stock to sell when, upon January 28, he ordered the 300 shares sold (Abst., 47); that he should be credited with $9,000 for the 100 shares of his then sold; that 350 shares afterwards coming into the possession of Crawford & Valentine, belonging to him, were sold without his knowledge and consent; 300 shares upon March 13, for $20,025; and 50 shares upon April 16 for $4,468.75, and that with these two he should be credited, and that he figures that after the payment of the check to Mr. Kent, Crawford & Valentine had about $12,200 of his money when they failed (Abst., 52). He admits that it is true that Crawford & Valentine had under their control upon January 28, 1895, more than 300 shares of Metropolitan Traction stock, and that they duly sold on his order and for his account and duly credited him with the proceeds of 300 of those shares, but he says the 200 of those shares were some which they had bought subsequent to their sales of January 10 and 11, and that as there was a lapse of some four or five days, when they did

not have more than 100 shares of Metropolitan Traction stock in their control, he will not admit that more than 100 shares of the 300 shares sold on January 10 and 11 belonged to him (Abst., 48, 59).

Thus, says Mr. Burke, there being on this occasion of Crawford & Valentine's failure no stock forthcoming, when there should have been certificates for 550 shares of Metropolitan Traction stock tendered to him upon the payment of his debt, and it being shown that the defendants sold this stock without his instructions, without his knowledge even, and without any right, they are liable to him in tort for its value at the times of such unauthorized sales, no substitution or commutation or anything of that sort to be allowed or considered. Therefore, too, he says the debt is one fraudulently contracted, and in the view of the law entertained by the plaintiff, not released by a discharge in bankruptcy.

It is a very simple matter, this. One would not have imagined from the plaintiff's statement of his case below that there was anything more to it than the simple sale of property belonging to the plaintiff by the defendants to whom it had been confidentially entrusted. One would never have supposed that Crawford & Valentine not only never handled or saw a share of this Metropolitan Traction stock of which Mr. Burke is talking; much less had it in their possession; but, further, that Mr. Burke knew perfectly well that they never had so seen or handled or possessed it, and never by any possibility could do so, unless and until he paid in full for such stock and ordered it to be sent on here from Philadelphia. But this appears absolutely from the evidence, despite Mr. Burke's reluctance to testify about it. (Abst., 53, 54).

Now, this brings us to the matters of the dealings in

Philadelphia between the defendants and certain Philadelphia brokers, which dealings had greater or less connection with the transactions out of which this suit grew. If we omitted them in originally describing those transactions it was because in our view they constituted no essential part of them. In it they belonged to the category of things well described by Judge Lowell in the *Swift* case *supra* as "vague" and "shadowy" obligations which the custom of brokers recognizes "contrary to logic and common sense," to "do something before the stock is finally demanded." But we hold as Judge Lowell does, that "although brokers would probably not consider that one of them fulfilled his contract unless he purchased at once the stock for which the customer put up the margin," yet that the broker is really bound by the contract with his customer, "even when the former advances part of the price," "to no more than this, *to deliver the stock to the customer at any time that the customer tenders the balance of the price. There is no obligation resting on the broker to buy shares in the first instance or even to refrain from disposing of them during the existence of the contract, so long as he delivers them when the customer tenders the money and demands performance.* * * * If the broker is solvent the customer is protected in any case. If the broker is insolvent he is protected in neither."

But in reality Mr. Burke's theory of the case, equally with ours and without any such reason for it, ignores in one sense the Philadelphia transactions. To be sure, in another way he makes much of them, going into the details of the account between Crawford & Valentine and Dick Bros. & Co. to prove his contention, that his stock was sold and converted by the former at various times; but when he cites "authorities" and attempts to apply rules laid down by

courts in this and other states to the facts of the case at bar, he ignores the most important fact at all, even on his own theory. All these cases (founded on the legal fiction invented by the majority of the court in *Markham* v. *Jourdain*, 41 New York, 49) relate to transactions where between the parties to the litigation it was expected by the customer that the broker would buy (according to this custom of brokers already alluded to) the stock, and keep it in his own hands; but in the case at bar this was never expected by Burke. The very utmost that could have been claimed by him on his own theory is that he instructed Philadelphia brokers to "purchase" or "receive" or "take over stock" to be paid for by said Philadelphia brokers, and to be "carried" in the name of said Philadelphia brokers until he should again instruct said defendants to order said Philadelphia brokers to sell the same (Abst., 40, 50). Perhaps it might be claimed also that the arrangement included, according to the customs and usages of the stock exchanges in Chicago and Philadelphia (of which Mr. Burke was cognizant) a guaranty on the part of the defendants to the plaintiff that so far as he was concerned they would protect the contract so made by the Philadelphia brokers. But there certainly could never be any trusteeship on the part of the defendants thus created, nor did there come nor were there expected to come nor could there ever come under the arrangement any property whatever into the hands of the defendants belonging to the plaintiffs, and, therefore, as we insist, no one of the line of cases on which plaintiff relies could be applicable; for they are all based on the assumption that the broker has actually in his possession certificates of stock which he has bought at the instance of the customer and his holding to meet his demand.

The case here is very different. Mr. Burke, when he or-

dered Crawford & Valentine to buy or sell stock, no certificate of which ever circulated in Chicago, knew also perfectly well that in whatever language such order was couched, Crawford & Valentine would not "buy" or "sell" stock. (See Abst., 53-56.) On his own theory he was requiring Crawford & Valentine by telegraphic communication to instruct somebody in New York or Philadelphia to buy that stock for the account of Crawford & Valentine, and he must have known by the nature of the business that this gave him no further security in his transactions beyond Crawford & Valentine's solvency and their willingness to respond to their contracts. For he knew that he was not the only customer of Crawford & Valentine, and he knew that any one of hundreds of such customers might desire to sell Metropolitan Traction stock. He knew that in the ordinary course of business in such a case Crawford & Valentine would order their correspondents in Philadelphia to sell for their (Crawford & Valentine) account so many shares of Metropolitan Traction stock. He knew that as between the brokers in Chicago and their correspondents in New York absolutely no account was taken of the principals of the Chicago brokers, but that all dealings were between brokers and in the name of the brokers only, and that no particular stock or certificates of stock were held even for such brokers. (Abst., 62, 63.) He knew, therefore, that if he had ordered 300 shares of Metropolitan Traction "bought" and Crawford & Valentine had so "bought" and Mr. Pullman had subsequently ordered 300 shares of Metropolitan Traction stock "sold" and Crawford & Valentine had so ordered it "sold," the Philadelphia brokers would buy the stock and credit it to Crawford & Valentine's account, because of the order given by Crawford & Valentine when Burke instructed them to "buy," and would sell the same amount of the same

stock upon the order of Crawford & Valentine and debit their account with it when Pullman instructed them to "sell," and that afterwards these Philadelphia brokers would have no Metropolitan Traction stock for Crawford & Valentine, but that both Burke and Pullman would have contracts with Crawford & Valentine, and that only (Abst., 133, 134). Mr. Burke was not like the innocent in the play who could not see how stocks could be "sold" until they were "bought." He was a seasoned speculator (Abst., 55) and knew that such a transaction would be perfectly regular, and yet leave Crawford & Valentine no Metropolitan stock whatever.

Now this, according to our idea, is exactly what did happen in that identical form, and in a slightly modified one in the transactions between Crawford & Valentine in Chicago and Toland Bros. & Co. and Dick Bros. & Co. in Philadelphia in relation to Metropolitan Traction stock. Take Dick Bros. & Co.'s account with Crawford & Valentine (Abst., 159, 160). On turning over the contract that these gentlemen had with Valentine & McAvoy concerning 450 shares of Metropolitan Traction stock, to Crawford & Valentine and accounting to them for it on July 2, 1894, they, Dick Bros. & Co., credited Crawford & Valentine with 450 shares of Metropolitan Traction stock they were then "carrying" for Crawford & Valentine. All the subsequent dealings with Metropolitan Traction are perfectly easy and simple to understand by collating Crawford & Valentine's books with Dick Bros. & Co.'s account. On August 25, 1894, one Emma F. Prentiss, having ordered five shares of Metropolitan stock "bought" by Crawford & Valentine, they order five more shares bought for them by Dick Bros. & Co., and they were credited with 255 shares on the books of Dick Bros. & Co. On August 30, however, Dick Bros. & Co.

shipped five shares to Crawford & Valentine, who delivered them to Mrs. Prentiss, as she had demanded them. Similarly on August 31, on account of an order by Mrs. Prentiss, Crawford & Valentine ordered Dick Bros. & Co. to buy ten more shares for their account and then had 450 shares credited to them. On September 10 Mrs. Prentiss gave another order for ten shares to Crawford & Valentine and Crawford & Valentine gave another order for that amount to Dick Bros. & Co., but these twenty shares were also, at Mrs. Prentiss' demand for them from Crawford & Valentine, demanded from Dock Bros. & Co. by Crawford & Valentine and delivered to them (Abst., 65, 66). So that 450 shares only remained credited to Crawford & Valentine on the books of Dick Bros. & Co. on September 30, 1894. On October 1, 1894, Burke ordered fifty shares "bought" and Crawford & Valentine ordered fifty shares bought by Dick Bros. & Co. (Abst., 66, 67).

This dealing in Philadelphia was in essence, and really, we hold, merely an "insurance" or "reinsurance" of the risk they were taking in their stockbrokers' contract with Burke. Instead of making themselves liable to Burke without recourse on anybody else, to furnish him fifty shares of stock, when he might demand it at the market price of October 1, 1894, they chose to reinsure themselves on "half a commission" (see Abst., 97, 141), by buying in Philadelphia for their own account. Relieved of all legal fictions this was the exact situation.

After that there were no transactions until October 24 (Abst., 67). On that day Joseph R. Wilkins, one of Crawford & Valentine's customers, ordered Crawford & Valentine to "sell" for him 100 shares of Metropolitan Traction stock (Abst., 68). Crawford & Valentine did not ask Mr. Burke's permission to do this. It was, according to their

views, and would have been then, according to his, none of his business. But they did the only natural thing in the world for them to do. They ordered Dick Bros. & Co. by wire to sell 100 Metropolitan Traction and on October 25 it was sold by Dick Bros. & Co. account of Crawford & Valentine, and Dick Bros. & Co. had then credited to Crawford & Valentine only 400 shares Metropolitan Traction stock. But it was only a quick "scalp" that Wilkins wanted to make; so on October 29, 1894, five days thereafter, he ordered Crawford & Valentine to "buy" 100 shares of Metropolitan Traction (see Abst., pages 69 and 70) and Crawford & Valentine ordered Dick Bros. & Co. to "buy in" the 100 shares of Metropolitan Traction and then Dick Bros. & Co. had again credited to Crawford & Valentine 500 shares of Metropolitan Traction stock. This transaction, in our view, was the simplest and most legitimate and most natural thing in the world for Crawford & Valentine to have made. It involves no kind of breach of faith or duty to their customer, Burke, who would never have dreamed of objecting to it had he known it at the time, or of supposing he had a right to object to it. It was the merely every day carrying out of an order for a customer to sell and buy in afterwards, on the supposition that the market was going down and the "bears" would have the best of it. But in Burke's theory of this case, as we shall see, it has now a most tremendous importance. The 100 shares sold on October 24, at 109¼, which he knew nothing about, he alleged were his. The 100 shares bought back on October 30 at 109—which he also knew nothing about, and which afterward on January 28, 1895, were sold at his order at 90⅛ (the proceeds being credited to him) he now says were none of his and he wants (which the court below would not allow him) $1,925 more damages on this account alone.

From October 30, 1894, to January 10, 1895, there remained credited to Crawford & Valentine on the books of Dick Bros. & Co. in Philadelphia 500 shares of Metropolitan Traction stock, just as there were 500 shares of that stock credited on the books of Crawford & Valentine to the plaintiff; but on January 10, R. C. Crawford for himself on his individual account (Abst., 74) ordered sold 200 shares Metropolitan Traction. This was just as much a "short" sale as had been the sale on Mr. Wilkins' account in the previous October. It was not any particular stock that Crawford & Valentine were ordering sold "Account R. C. Crawford." It was not any particular stock that Dick Bros. & Co. were selling for them. Least of all was it Mr. Burke's stock. It was merely a short sale for R. C. Crawford's own account by him undoubtedly innocently made and without a thought of any concealment from Burke or anybody else. Mr. Burke himself testified that Crawford told him that he was "bearish" about Metropolitan Traction stock (Abst., 61), and it was natural for Mr. Burke to suppose that being as speculatively inclined as he was, Mr. Crawford would "back his opinions" by his acts. In our view, however, right here is the mistake made by the defendants. Neither jointly, as they afterwards did, nor individually as in this instance, was it wise or prudent for them to "trade" on their own account in Philadelphia in stocks in which their customers or any of them were "trading" with them. Not that it made any practical difference to Burke whether they did it for "R. C. Crawford," as we think they should not have done, or for their customer Joseph R. Wilkins, as we think it was perfectly legitimate and proper for them to do. But it rendered them liable to misconception and to the acrimonious charges afterward made against them. In our theory Crawford & Valentine, neither in this sale nor in the

Wilkins one on October 24, sold Burke's stock; Burke had no stock in their hands or in the hands of anyone else to sell. They sold "short" for R. C. Crawford, however, and the result was to diminish the amount Dick Bros. & Co. held credited on their books for their account from 50 to 300 shares.

Mr. Burke's view of this is different. By considering the Wilkins sale on October 24 a sale of his stock and repudiating the Wilkins purchase on October 29, he figures that on January 10 Crawford & Valentine had in Dick Bros. & Co.'s hands 400 shares only of his stock and 100 shares of their own. When they sold 200 shares "for account R. C. Crawford" then, he figures that 100 of it was their own stock and 100 his, which left only 300 shares of his in the hands of Dick Bros. & Co. This 100 shares of his were sold at 100¾, he thinks, and although these were also bought back and sold at his order on January 28 at 90⅛ and the proceeds credited to him, he repudiates this transaction also and makes another $1,062.50 of additional damages he thinks he should have from this source, because he says that there was but 100 of his shares to sell on January 28. Thus, practically, $3,000 of the additional damages he demands in his assignment of cross errors in the State Supreme Court, Mr. Burke refers to his claim that the 300 shares sold on his order at his price on January 28, 1894, and reported to him on that day, were not his, because the same stock had been for other parties ordered "sold short" and then "bought in" by Crawford & Valentine before January 28.

On the next day, January 11, Crawford & Valentine, still trading for the individual account of R. C. Crawford (Abst., 75), ordered "sold" by Dick Bros. & Co. 200 more shares of Metropolitan Traction, thereby leaving only 100 shares in the hands of Dick Bros. & Co. subject to the con-

trol of Crawford & Valentine. The 200 shares thus ordered, as we say, sold "short for account R. C. Crawford," Mr. Burke says were his stock tortiously converted on January 11; and so, when on January 25 (Abst., 76), for the account of R. C. Crawford, Crawford & Valentine ordered "bought in" (as correlative to that extent to the short sale doubtless) 350 shares of Metropolitan Traction, Mr. Burke declines to consider that he had any interest in the 450 shares which then stood on Dick Bros. & Co.'s books to the credit of Crawford & Valentine—beyond the 100 shares which had remained there all the time.

On the 28th of January Crawford & Valentine seem to have sold for the account of R. C. Crawford 100 shares of Metropolitan Traction stock, that left 350 shares in Dick Bros. & Co.'s hands which Crawford & Valentine controlled.

Then came Mr. Burke's order to Crawford & Valentine on January 28 to sell 300 shares and Crawford & Valentine in the usual course passed on the order to Dick Bros. & Co. and Dick Bros. & Co. sold for account of Crawford & Valentine 300 shares at the market price, and credited Crawford & Valentine with the proceeds and Crawford & Valentine reported to Burke and credited him with the proceeds (Abst., 78, 79).

But Mr. Burke says they had had only 100 shares of his stock then to sell.

Then on February 4 (Abst., 79, 80) the firm of Crawford & Valentine jointly—for "a house account" known as "Stocks and Bonds"—first "sold" and then "bought in" (which seems a favorite method with stock speculators) through Dick Bros. & Co., 50 shares of Metropolitan Traction. On March 13, 1895, for the account of R. C. Crawford, Crawford & Valentine ordered 50 shares Metropolitan sold by Dick Bros. & Co. and again on the same account

March 29 100 shares bought, and on April 17 100 shares sold (Abst., 80, 81, 82).

That left no shares in the hands of Dick Bros. & Co. controlled by Crawford & Valentine.

The transaction shown in the account with Toland Bros. & Co. (Abst., 155, 156) running over a shorter space of time are not different. Beginning with the contract of 300 shares for Crawford & Valentine by Toland Bros. & Co., an order which was given at the instance of the plaintiff and on the occasion of his orders to the defendants, there followed a sale for the joint account of Crawford & Valentine of 50 shares, and, later, of 350 for the individual account of R. C. Crawford, which wiped out on Toland Bros. & Co.'s books any credit to Crawford & Valentine.

In all these transactions with "Metropolitan Traction," as with the great variety of other stocks figuring in the accounts between Crawford & Valentine, Dick Bros. & Co. and Toland Bros. & Co., we hold that there was no more wrong than speculating on insufficient capital always involves, or than the unwise policy of a man who is a broker ever allowing himself to become a principal always entails, no positive fraud committed on Mr. Burke, nothing done that he could not have anticipated at any time might be done, if he stopped in his speculations to think of the true relations of the parties. We do not think that the legal relations between Mr. Burke and the defendants would be, even in New York, regulated by the doctrines of *Markham* v. *Jourdain,* or the cases that follow it, because of the difference between a broker at first hand and a mere "middleman" or "forwarder" or "stock speculator's agent"; but even if Crawford & Valentine had been the real handlers of Metropolitan Traction stock, Judge Lowell, following such judges as Chief Justice Shaw and Judge Devens, says the

law of these stockbroker's transactions as interpreted in Massachusetts imposes on the broker "no obligation to buy shares in the first instance or to refrain from disposing of them during the existence of the contract." (*In re Swift, supra.*)

We hold that the question of whether there was "positive fraud involving moral turpitude" in these transactions, which is the question primarily before this court, on the operation of the bankruptcy discharge in this case, can not depend on whether this court adopts a view of the law held by Judge Hunt in New York, or Chief Justice Shaw in Massachusetts. It might in the one case hold there was "constructive" fraud, and in the other hold that there was none; but it could not, we conceive, hold that there was actual and moral turpitude in either. To do so would be to hold that Crawford & Valentine merely by entertaining the same view of their legal obligations that Chief Justice Shaw, and Judge Devens and Judge Lowell, to say nothing of Judges Grover and Woodruff (the dissenting Judges in *Markham* v. *Jourdain*), entertain, have placed themselves in the category of criminals. We cannot think this for one moment tenable.

As to the counts upon deceit, on our view of the case, they must of course fall with the others, independently of the proposition of the court below that we are and can only be liable on one set or the other of these counts.

If the relations were contractual, and the contract was that the defendants agreed to be liable for the profit to the plaintiff, if the stock went up, and he agreed to protect them against loss if the stock went down, and to keep sufficient security in their hands for the purpose at all times, then it was Burke's duty under that contract to put up in the hands of the defendants the various amounts which he

put up. No representations, therefore, to induce him to put up such margins, were material even if they were made. We have no doubt that margins were figured out upon 500 shares or 550 shares at various times; *that* was no representation that Dick Bros. & Co. for the account of Crawford & Valentine, were carrying the certificates of such shares in Philadelphia. The representation that was made by the defendants was exactly what the plaintiff understood it to be, namely, that they held themselves liable to get the shares and sell them for him when he ordered it, or else pay the profit which he would have made had they procured such stock. In other words, they were liable to him upon a "deal" involving nominally 500 shares of Metropolitan Traction stock, or such other number as the case might be. Of course their books showed that deal with Burke, just as their books also showed in the "R. C. Crawford New York Account" and in the "Stock & Bonds" account that they were themselves speculating in the same stock in Philadelphia. Had they continued in business, Burke's check would undoubtedly have been handed him the minute that he ordered the sale and the market price in Philadelphia had been ascertained.

The calling for and crediting of all the various margins were in the ordinary course of business, and, so far as the evidence shows, entirely without any idea of concealment or bad faith on the part of the defendants.

We are quite aware that much of this statement is argumentative; but we have endeavored to present fairly in it the differing theories of the parties on the same admitted state of facts; and there was no other way that we could see, in a case like this, to bring clearly before the court the question necessary for their consideration.

And that, after all, is the function of the "statement."

If, while presenting our own view, we have omitted anything which would make for the defendant in error as against our contentions, it has been done unwittingly, and it can do no harm, for it will undoubtedly be amply elaborated by the defendant in error himself and the able counsel who assist him.

To recapitulate, briefly, in logical sequence the statement above set forth, the testimony offered develops the following facts:

1. The plaintiffs in error about the 1st of July, 1894, organized a copartnership under the name of Crawford and Valentine, to engage in the business of banking and stock brokerage. The firm was located in the City of Chicago, and succeeded to the business of Valentine & McAvoy, who had been engaged in the same line for a period of time immediately prior to July 1.

2. The defendant in error had for some time been dealing in various kinds of stocks through Valentine & McAvoy, and upon its dissolution and the organization of the new firm (plaintiffs in error) continued his line of business with the latter firm. His manner of dealing in stocks was the same with both firms.

3. At the time of the dissolution of the old firm there appeared upon its books, as a credit to the defendant in error, four hundred and fifty shares of Metropolitan Traction stock. This account entire was transferred by the assent of all parties, to the new firm, the new firm assuming the liability of the old one to the Philadelphia brokers for the purchase money of this stock.

4. On the 28th of September, 1894, the defendant in error placed an order with the plaintiffs in error for the purchase on his account of fifty shares more of the Traction stock, and again, on the 28th of March, 1895, a further

order for fifty additional shares, and on the 29th of January, 1895, had transferred from Jamieson & Co. to his account with the plaintiffs in error, three hundred shares of the same stock. This last bunch of stocks was being held or carried by Huhn & Glendenning, stockbrokers at Philadelphia. All the other shares referred to were carried either by Dick Bros. or Toland Bros. & Co., also stockbrokers at Philadelphia. When the account as to the three hundred shares last mentioned was transferred from Jamieson & Co. to Crawford & Valentine, a corresponding transfer of account, etc., was made between Huhn & Glendenning and Toland Bros. & Co., the latter of whom were, at the time, correspondents of plaintiffs in error.

On the 28th of January, 1895, defendant in error ordered the sale of three hundred shares of this stock, which left credited to his account on the books of the plaintiffs in error the five hundred and fifty shares to which he makes claim in this action.

5. All the Metropolitan Traction stock involved here was ordered by the plaintiffs in error or their predecessors to be bought by the Philadelphia stockbrokers referred to, at Philadelphia, and upon the Philadelphia Stock Exchange. Valentine & McAvoy placed the orders for the four hundred and fifty shares first mentioned with Dick Bros. and when the account of defendant in error was transferred from the old firm to the new a corresponding change was made upon the books of Dick Bros.

6. All of this traction stock was bought by the Philadelphia brokers as correspondents of the plaintiffs in error, and paid for by the Philadelphia brokers for the account of plaintiffs in error or their predecessors.

7. The stock when so purchased was credited to plaintiffs in error account with such brokers, and the account ch^{g}'ged its full purchase price.

8. This stock and the whole of it was held by the Philadelphia brokers as collateral security to the indebtedness of the plaintiffs in error to them.

9. The defendant in error has never been known in any way, or at any time, to the Philadelphia brokers in their transactions with the plaintiffs in error or their predecessors, touching the purchase, holding, and sale of the stock in question.

10. None of the certificates of stock in question has ever been in the possession of the defendant in error nor under his actual and undisputed control.

11. None of such stock was ever paid for or received in the possession of the plaintiffs in error, but remained at all times in the possession of the Philadelphia brokers, as collateral, until sold, and the proceeds applied to the payment of the indebtedness of the plaintiffs in error to them.

12. The defendant in error at no time in his dealings with the plaintiffs in error and their predecessors ever paid anything upon the purchase price of the stocks in question which he claims were being "carried" for him, except enough from time to time to cover margins.

13. The defendant in error knew that the plaintiffs in error dealt through the Philadelphia brokers named, in the same manner stated, and that such brokers held such stock at all times as collateral to indebtedness of the plaintiffs in error to them, and that neither he nor the plaintiffs in error could secure the possession of such stock until such indebtedness had been paid, and that when sold the proceeds would be applied to such payment.

14. The plaintiffs in error during the period of the transactions with them, of defendant in error, bought and

sold Metropolitan Traction stock through the same brokers, on their own account, and for the account of others than the defendant in error.

15. No particular certificates of shares of this traction stock were ever set out from the mass of such stock held by the Philadelphia brokers, as the separate property of defendant in error, or of the plaintiffs in error. It has never been possible at any time, nor is it possible now, for the defendant in error to identify and recover any particular certificate of shares as his, or in which he has an interest. The most he can claim, if he can claim anything, is a redeemable interest in a definitely measured quantity of a mass.

16. All of the holdings of Metropolitan Traction stock by the Philadelphia brokers *in the name and upon the account of plaintiffs in error* were sold and closed out by orders of plaintiffs in error prior to May 1, 1895.

17. Not until the 20th of May, 1895, the day upon which the affairs of the plaintiffs in error passed into the hands of a receiver, in an action to dissolve the partnership, etc., did the defendant in error ever ask the possession or delivery of this stock or offer to pay its purchase price, and then his offer and demand was made in the following manner only. He says:

> "The first thing I did when I went there" (office of defendants) "was to give an order to have the Metropolitan Traction stock which I supposed I had in Philadelphia in the hands of the correspondents of Crawford & Valentine, sent here from Philadelphia to be taken up by me. * * * I gave the order to an employe in the office and also wrote out an order on said Dick Bros. & Co. and upon Toland Bros. & Co. They were the correspondents of the defendants in

Philadelphia where I supposed the stock was." (Abst., 51.)

18. During the period of mutual dealings of the parties the plaintiffs in error kept books of account and rendered monthly statements to the defendant in error showing items in detail on debit and credit side.

19. The inference is clear from the testimony, and from the manner of dealing in stock of various kinds by the defendant in error, that he never intended to pay for and receive into his actual possession any shares of stock, nor to become in fact the owner in good faith of any stock, but, on the contrary, that the sole purpose of his transactions through the plaintiffs in error was the margins or market differences in stocks. In other words, the defendant in error was speculating in market differences and not in shares of stock.

20. As has been said the defendant in error has paid nothing to the plaintiffs in error on the purchase money of this stock, except such sums from time to time as were demanded to cover margins. For that purpose he was paid as follows:

Dec. 20, 1894	$2,000.00
Jan. 11, 1895	2,000.00
Jan. 25, 1895	2,000.00
Jan. 29, 1895	1,000.00
(This last sum was paid to margin 200 shares.)	
April 1, 1895	3,500.00
($3,300 of the last sum was paid in by Wm. Kent for defendant in error and was repaid May 13, 1895.)	

21. The evidence plainly shows that the contracts and dealings between the parties were gambling contracts and transactions in violation of law and public policy, and hence, that such demand as the plaintiff makes is not recoverable.

ERRORS RELIED ON.

The errors relied upon are embraced in the 5th, 6th, 12th and 17th assignment of error, viz.:

That the Supreme Court of Illinois erred in not holding that the discharge in bankruptcy was a bar to the action, and a legal defense thereto.

That the Supreme Court erred in not holding that the Circuit Court erred in refusing to admit the evidence offered by the plaintiffs in error in substantiation of the issue raised by the bankruptcy discharge and the replication thereto.

That the Supreme Court erred in not declaring the demand not recoverable as a gambling transaction and against public policy.

BRIEF.

I.

THE CLAIM OF DEFENDANT IN ERROR IS A PROVABLE DEBT IN BANKRUPTCY UNDER THE BANKRUPTCY ACT OF 1898.

Bankruptcy Act, 1898, Sec. 17; Sec. 1 (11); Sec. 63.

In re Hirschman, 104 Fed. Rep., 69.

T. W. & W. Ry. Co. v. *Clews,* 67 Ill., 383.

Elliott v. *Jackson,* 3 Wis., 649.

Sloat v. *Evans,* 35 Ill., 455.

Western Assurance Co. v. *Towle,* 28 N. W., 106 (Wis.).

Dashaney v. *Rogers,* 21 Pac. Rep., 342 (Cal.).

In re Filer, 125 Fed. R. 261.

In re Silverman, 101 Fed. Rep., 219.

Collier on Bankruptcy, 344, 338.

Beers v. *Hamlin,* 99 Fed. Rep., 695.

In re Hilton, 104 Fed. Rep., 981.

In re Graff, 117 Fed. Rep., 343.

II.

BEING A PROVABLE DEBT, THE CLAIM IS OF SUCH A CHARACTER THAT IT IS BARRED BY THE DISCHARGE IN BANKRUPTCY OF PLAINTIFFS IN ERROR, IT NOT BEING WITHIN ANY OF THE EXCEPTIONS OF SECTION 17 OF THE BANKRUPTCY ACT.

(1) *As stock-brokers, or factors, plaintiffs in error were not "acting in a fiduciary capacity."*

Chapman v. *Forsyth,* 2 How., 202.

Neal v. *Scroggs,* 95 U. S., 704.

Keine v. *Graff,* 14 Fed. Cases, No. 7650.

Hennequin v. *Clews*, 111 U. S., 565.
Grover & Baker Co. v. *Clinton*, 11 Fed. Cases, No. 5845.
Noble v. *Hammond*, 129 U. S., 68.
Upshur v. *Briscoe*, 138 U. S., 375.
Anstill v. *Crawford*, 7 Ala., 340.
Woolsey v. *Cach*, 54 Ala., 383.
Sanders v. *Sanders*, 56 Ark., 588.
Chipley v. *Frierson*, 17 Fla., 642.
Georgia R. Co. v. *Cubbedge*, 75 Ga., 323.
Dupont v. *Beck*, 81 Ind., 274.
Phillips v. *Russell*, 42 Me., 361.
Hyman v. *Powl*, 7 Met., 330.
Halpin v. *May*, 100 Mass., 499.
Cronan v. *Cotting*, 104 Mass., 245.
Woodward v. *Towne*, 127 Mass., 42.
Green v. *Chilton*, 57 Miss., 599.
Gibson v. *Gorman*, 44 N. J. L., 327.
Palmer v. *Hussy*, 87 N. Y., 308.
Lawrence v. *Harrington*, 122 N. Y., 408.
Mulock v. *Byrns*, 129 N. Y., 25.
Bissell v. *Couchine*, 15 Ohio, 64.
Curtis v. *Waring*, 92 Pa. St., 109.
Scott v. *Porter*, 93 Pa. St., 40.
Pankey v. *Nolan*, 6 Humph., 155.
Hammond v. *Noble*, 57 Vt., 200.
Slayton v. *Wells*, 66 Vt., 63.
Wilson v. *Kirby*, 88 Ill., 570.
Straw v. *Jurgens*, 144 Ill., 507.
Shepherd v. *Furness*, 153 Ill., 590.
Pierce v. *Shippee*, 90 Ill., 376.
Am. & Eng. Ency. of Law, Vol. 16, p. 781 (2d Edit.).
In re Basch, 97 Fed. Rep., 761.
Bracken v. *Milner*, 104 Fed. Rep., 522.

(2) *The clause "fraud," etc., used in subdivision four of section 17, is limited and restricted by the qualifying clause "while acting in a fiduciary capacity." There being no fiduciary relation between the parties, the debt is not within the exception, and hence is barred.*

In re Rhutassel, 96 Fed. Rep., 599.
In re Hirschman, 104 Fed. Rep., 69.
In re Lewinsohn, 99 Fed. Rep., 74.
Hargadine-McKitrick Co. v. *Hudson*, 111 Fed. Rep., 361.
Gee v. *Gee*, 87 N. W., 1116.
In re Bullis, 73 N. Y. Supp., 1048.
Allen v. *Ferguson*, 85 U. S., 1.

III.

"FRAUD," AS USED IN THE ACT, MEANS POSITIVE FRAUD, INVOLVING MORAL TURPITUDE—NOT CONSTRUCTIVE FRAUD, OR FRAUD IN LAW. CONVERSION BY ONE IN LAWFUL POSSESSION OF PROPERTY IS NOT "FRAUD" WITHIN THE MEANING OF THE BANKRUPTCY ACT. HENCE THE CLAIM OF DEFENDANT IN ERROR DOES NOT FALL WITHIN THE MEANING OF THE TERM "FRAUD" AS THERE USED. AND ON THIS POINT THE ENTIRE EVIDENCE IS PROPERLY BEFORE THE COURT ON THE PLEA PUIS AND THE REPLICATION THERETO.

Chitty on Pleadings, 246.
Clough v. *Shepherd*, 31 N. H., 490.
Teel v. *Fonda*, 4 John., 304.
Neal v. *Scroggs*, 95 U. S., 704.
Hennequin v. *Clews*, 111 U. S., 565.
Noble v. *Hammond*, 129 U. S., 68.
Upshur v. *Briscoe*, 138 U. S., 138.
Keime v. *Graff*, 14 Fed., Cas. No. 7650.
Bracken v. *Milner*, 104 Fed. Rep., 522.
Burnham v. *Pidcock*, 68 N. Y. Supp., 1009.
In re Benedict, 75 N. Y. Supp., 165.

In re Gaylord, 113 Fed. Rep., 131, 135.
Scott v. *Porter,* 39 Am. Rep., 726.
Watertown Carriage Co. v. *Hall,* 72 N. Y. Supp., 466.
Crosby v. *Miller,* 25 R. I., 172 (55 Atl., 328).
Western, etc., Co. v. *Hunt,* 116 Fed. Rep., 442.

IV.

THE CASE MADE BY DEFENDANT IN ERROR SHOWS THAT THERE WAS NO FRAUDULENT INTENT OR POSITIVE FRAUD ON THE PART OF PLAINTIFFS IN ERROR, AND THAT THE RELATIONS BETWEEN THE PARTIES WERE PURELY CONTRACTUAL AND THEREFORE NOT RESPONSIVE TO THE COUNTS EITHER FOR CONVERSION OR DECEIT.

Markham v. *Jourdain,* 41 N. Y., 239.
Wood v. *Hayes,* 15 Gray, 375.
In re Swift, 105 Fed. Rep., 493.
Coville v. *Loud,* 135 Mass., 41.
Weston v. *Jordan,* 168 Mass., 501.
Corbett v. *Underwood,* 83 Ill., 324.

V.

THE EVIDENCE SHOWS THAT THE TRANSACTIONS OUT OF WHICH THE CLAIM OF DEFENDANT IN ERROR ARISES WERE OF A GAMBLING CHARACTER AND ILLEGAL AND VOID AT COMMON LAW AND UNDER THE STATUTE. THE COURT MAY, AT ANY STAGE, WHEN IT APPEARS THAT THE MATTER INVOLVED IS FORBIDDEN BY PUBLIC POLICY, OR IS AGAINST PUBLIC MORALITY, DECLINE TO CONSIDER A CLAIM SO FOUNDED, REGARDLESS OF THE PLEADINGS.

Lyon v. *Culbertson,* 83 Ill., 38.
Soby v. *People,* 31 Ill. App., 242.
Cothran v. *Ellis,* 125 Ill., 506.

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Cothran v. *Ellis,* 125 Ill., 506.

Schneider v. *Turner*, 130 Ill., 39.
Jameson v. *Wallace*, 167 Ill., 396.
Oscanyon v. *Arms Co.*, 103 U. S., 261.
Martin Emerich Outfitting Co. v. *Siegel, Cooper & Co.*, 108 Ill. App., 364.

ARGUMENT.

The vital point in this case is the question of the effect of the discharge in bankruptcy of plaintiffs in error upon the debt or claim which the defendant in error seeks to recover in this action.

The action, in form, is founded upon the alleged acts of fraud by conversion or misrepresentation by plaintiffs in error occurring long prior to the filing of their petition in bankruptcy. The court below found conversion of plaintiff's "reversionary" interest in the stock and rendered judgment against the plaintiffs in error on that ground. This finding of the Circuit Court was not based upon the evidence in the case, but upon the pleadings, the court holding that the defendants, by filing their plea *puis darrein* continuance, confessed the allegations of the declaration (Abst., 241-242). This was error. The Court should have found on the issues raised by the plea *puis* and the plaintiff's replication thereto, and its findings should have been based on the evidence pertinent to those issues. This question will be discussed later in the brief.

The bankrupt law under discussion is the Act of 1898, now in force. The section chiefly involved is as follows:

> "Section 17. A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance with the name of the creditor if known to the bankrupt, un-

less such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

I.

The provable character of the claim of defendant in error is the first question to demand attention. Is his claim a "provable debt"?

The provisions of the Bankrupt Act bearing directly upon this question are as follows:

"Section 1. * * * (11) "Debt" shall include any debt, demand or claim provable in bankruptcy."

"Sec. 63. Debts which may be proved. (a) Debts of the bankrupt may be proved and allowed against his estate, which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt, who was, at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition, and up to the time of the entry of such judgments.

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Two views of paragraphs (a) and (b) and their relation to each other suggest themselves.

1st. That paragraph (a) classifies all claims that are provable, and paragraph (b) provides for the liquidation of such of them as are unliquidated at the date of the filing of the petition in bankruptcy.

2d. That paragraph (a) refers to claims of a contract character only, while paragraph (b) refers to, and includes, additional claims not necessarily of a contract character, but of whatever character, so long as the demand and the right of action thereon existed at the time of the filing of the petition.

Under either view, the demand of defendant in error is a "provable debt," because:

1st. "Debts of a bankrupt may be proved and allowed against his estate which are * * * (4) founded upon account or upon a contract express or implied." (P. (a), Sec. 63.) That is to say: if a claim "may" be proved—if it possesses a provable character or quality in any view—it is a "provable debt."

The demand of the defendant in error possesses that quality. It is of a quasi-contract character. He may waive the tort and recover for money had and received to his use on an implied contract. This is the law in cases of conversion.

T. W. & W. Ry. Co. v. *Clew,* 67 Ill., 383.
Elliott v. *Jackson,* 3 Wis., 649.
Sloat v. *Evans,* 35 Ill., 455.

It is obvious that the defendant in error can not, by his selection of a form of action, destroy, as against the bank-

rupt, and his right under the Bankrupt Act, the "provable" character of his demand. The question always is, does it possess inherently a provable character? Is there in it an "implied" contract?

In re Hirschman, 104 Fed. Rep., 69, is directly in point. The bankrupt in that case had obtained a stock of goods under false pretenses. A portion of them he had sold. Certain creditors repudiated the sales and recovered, respectively, the goods unsold in an action of replevin, and applied for an order under the provisions of paragraph (b) for the liquidation and proving up of their claims for balances. The court, upon making the order applied for, said:

> "Section 63 (a) does not authorize the proof of any claim arising *ex delicto,* unless recovery may be had in quasi-contract. Under Sub-section 4, claims founded upon a contract express or implied may be proved. The implied contract includes the fictitious contract implied in law—only treated as a contract for the sake of the remedy—and the true contract implied in fact. * * * If the goods were sold by the bankrupt the petitioners can treat the sales as made for them and maintain a claim for the consideration obtained by the bankrupt as money had and received to their use. This is said to be waiving the tort and suing on contract."

The following authorities are to the point, that the law is the same when money or goods have been obtained under false representations:

Western Assurance Co. v. *Towle,* 26 N. W., 106 (Wis.).

Graham v. *M. & St. P. Co.,* 10 N. W., 612 (Wis.).

Dashaney v. *Rogers,* 21 Pac. Rep., 742 (Cal.).

The case *In re Filer,* 125 Fed. Rep., 261, is a very strong case on this question and peculiarly applicable to the case at bar.

The question whether or not the claim of defendant in error is liquidated or unliquidated is unimportant. The necessity in some cases of first liquidating claims under the order of the court (paragraph b) detracts nothing from their provable character. Proceedings for liquidation under the act go to the question of practice and not to the provable character of the claims to be liquidated. A demand founded upon an express contract and for a breach of it may have to be first liquidated under the provision of this paragraph and yet it is none the less provable and entitled to share in dividends from the estate.

In re Silverman, 101 Fed. Rep., 219.

In re Beers v. *Hamlin,* 99 Fed. Rep., 695, the District Court of Oregon held that unliquidated damages for assault and battery could not be the basis for an involuntary petition in bankruptcy. This is obviously so. First, because such a petition must be based on claims aggregating $500. A claim for an assault or other malicious injury is, in its nature, so uncertain as not to be the basis of any proceeding, aside from one to determine its amount, and this may result in nominal damages merely, or none at all. Second, because until liquidated by judgment or under the provisions of the act such claim is not in provable shape. The act does not contemplate that claims of an unliquidated character, no matter what their nature, shall have recognition until its machinery has been fully set in motion; then the provision for the liquidation of such claims (paragraph b) takes hold and adjusts them so they may share in any dividends that may come.

In re Hilton, 104 Fed. Rep., 981.

The case *In re Brinkman,* 103 Fed. Rep., 65, is substantially the same in its facts as *Beers* v. *Hamlin,* and the decision is to the same effect.

The decision in both these cases would have been the same had the petition been based on an unliquidated claim for damages, for breach of an express contract; in which case it would hardly be contended that such a claim is not a "provable debt" for the purpose of sharing dividends.

2d. Under the other view of Section 63, referred to, claims for conversion, deceit and fraud, and claims resting wholly in tort, such as for trespass, personal injuries, damages to property, and even wilful injuries "may be proved and allowed," etc.—are "provable debts" so as to share in dividends, subject, of course, to liquidation in the manner there prescribed.

The language of the act is certainly broad enough to include any demand that may be liquidated and the amount definitely determined. "Unliquidated claims against the bankrupt," etc., ars terms that convey no hint of limitation. Collier, in his work on Bankruptcy, says (p. 344):

> "The language of paragraph b. itself seems to be broad enough and free enough from ambiguity to justify the conclusion that all unliquidated claims may be liquidated and proven and allowed, and there would seem to be no more reason for denying to a person injured by the tort of another a right to recover a pro rata payment upon the damages awarded to him than for denying to a contract creditor the dividend upon the debt due him, although there are ample reasons for refusing to release the tort feasor for the debt incurred by his tort."

In *Beers* v. *Hamlin, supra,* concerning a claim for damages for assault and battery, the court says:

> "A claim like this, arising out of a tort, must be reduced to judgment, or, pursuant to application to the court, be liquidated in such manner as the court

shall direct, in order to be proved against the bankrupt's estate."

The Bankrupt Act of 1867, by express terms, made claims for conversion, etc., provable. The act reads (paragraph 5067):

> "All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him, may be proved and allowed as debts," etc.

There is no apparent reason why Congress should provide for the allowance of such claims under one act and not under the other, especially when both acts provide a way for liquidating the amount of such claims.

Collier on Bankruptcy, 338.

The position that every claim, no matter what its character, provided that it exists before adjudication in bankruptcy, and the amount of it can be determined in the way pointed out "may be proved and allowed" is strengthened by the language of Sec. 1:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as," etc. And then follows a list of "debts"—"provable debts"—not released. The words "provable debts," by the terms of the act, are made to apply to the different classes of demands that follow immediately after these words. These classes cover demands of the character of the plaintiff's as asserted in this action.

This view is further warranted by the language of a like section in the act of 1867, which reads as follows:

> "Section 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a

public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

While the language of the two sections differs, the evident purpose is the same in each. In both, the excepted liabilities of the bankrupt are referred to as "debts." In one act they are mentioned as "provable debts," and in the other as "debts" that "may be proved." Where is the difference?

The test of provability of a demand is the legal right under the law of the claimant to prove it, liquidated or unliquidated, and share in the dividends of the estate against the objection of contesting creditors.

If it be conceded for the sake of argument that there are a class of claims not provable against such objection, as for example, claims arising out of the violation of a criminal statute, and the like, this is not such a claim. It seems too clear for argument both on principle and under the authorities, that defendant in error could have filed his claim in the bankruptcy proceedings in question had he chosen to do so, and that the same thereupon would have been allowed against any objection that creditors might have made.

II.

Assuming that the demand of the defendant in error is provable in bankruptcy, is it barred by the discharge of plaintiffs in error?

The only exceptions in Section 17 of the Bankrupt Act at all available to the defendant in error are found in Subdivisions 2 and 4.

It is too plain for argument that the defendant in error's

demand is not within the provisions of Subdivision 2, as it is not in judgment. This Mr. Burke frankly admitted at the trial.

If "fraud," etc., mentioned in Subdivision 2, must be merged in judgment in order to be available to the defendant in error, it seems quite clear that such judgment, in order to be within the exception, must have been entered before the bankrupt obtains his discharge, and, perhaps, before the commencement of the proceedings in bankruptcy, otherwise there would be no reason in limiting the exceptions to judgments on claims based on the wrongs mentioned in this subdivision, instead of extending it, in terms, to the claims themselves.

It follows that in order to recover as against the discharge the defendant in error must bring his demand within the provisions of Subdivision 4 and rely entirely upon the "fraud, embezzlement, misappropriation or defalcation" of plaintiffs in error while acting in a "fiduciary capacity."

Did the plaintiffs in error at any time during the course of the transactions out of which this controversy arose, sustain to the defendant in error a fiduciary relation or "character" or "capacity" within the meaning of this subdivision?

(1) Crawford & Valentine were stockbrokers or factors, dealing in various stocks on the Philadelphia Stock Exchange, through Philadelphia stockbrokers. Whatever stocks were "purchased," including the stock in question, remained with the eastern brokers as and for the purpose heretofore stated. Mr. Burke had long been a speculator in the stock market, and was perfectly familiar with markets, margins, commissions, etc., and also with the character of all the transactions in which he was engaged—the rules, customs and regulations governing the business generally.

He was perfectly familiar with his dealings in stocks, through the plaintiffs in error, and knew that the business was being conducted as it was, and according to the usual and customary manner.

Books of account were kept by plaintiffs in error wherein were entered in detail, in an account with defendant in error, their mutual transactions, showing credits for all moneys received from whatever source, and debits for all moneys paid out, etc. Detailed monthly statements of this account were regularly sent to the defendant in error.

Under the Bankrupt Act of 1841 it was held by the Supreme Court of the United States, in the case of *Chapman* v. *Forsyth*, 2 How., 202, and followed by a long line of authorities, that such a factor or broker did not sustain a fiduciary relation to his principal, and that his discharge in bankruptcy would bar a demand arising from failure to account for proceeds of property committed to his charge. It is the leading case on this question. The court below had, in a certified case, submitted the following question:

> "2. Is a commission merchant and factor who sells for others indebted in a fiduciary capacity within the act (1841) provided he withholds the money received for property sold on account of the owner, and the money received on owner's account?"

The part of the Act of 1841 involved, and corresponding to Section 17 of the present act, reads as follows:

> "All persons whatsoever residing in any state, territory, or district of the United States, owing debts which shall not have been created in consequence of the defalcation as a public officer or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, shall be entitled to a discharge," etc.

The Supreme Court in answering the question says:

> "The second point is, whether a factor who retains the money of his principal is a fiduciary debtor within the act.
>
> "If the act embraces such a debt it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of them is in a commercial sense a disregard of a trust. But this is not the relation spoken of in the first section of the act.
>
> "The cases enumerated, 'the defalcation of a public officer,' 'executor,' or 'trustee,' are not cases of implied but special trust and the other 'fiduciary capacity' mentioned must mean the same class of trusts. The law speaks of technical trusts and not those which the laws imply from the contract. A factor is not, therefore, within the act."

The same Court has held that the bankrupt acts of 1867 and 1841 are the same in this respect, and must receive the same construction. The corresponding part of the Act of 1867 reads as follows:

> "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act."

In *Neal* v. *Scroggs,* 95 U. S., 704, a case under the Act of 1867, the court quoted verbatim the above language of the opinion in *Chapman* v. *Forsyth,* reaffirming the decision and giving the same construction to the term "fiduciary capacity" as used in the Act of 1867.

In *Keine* v. *Graff*, 14 Fed. Cases, No. 7650, the defendants were commission merchants and as such sold cheese consigned to them by the plaintiff, and rendered an account of such sale. Plaintiff drew. The draft was not paid. Defendants obtained a discharge in bankruptcy. Was the debt barred by the discharge? The court holds that it was, and discusses at some length both of the foregoing decisions, and adopts the same construction of the term "fiduciary capacity," viz., that it refers to "technical trusts and *not to those the law implies from the contract.*" The opinion continues:

> "Now the default of the factor in not making payment to his principal is not a fraud within the meaning of the 33rd section of the Act of 1867, as is shown by *Neal* v. *Scroggs*, nor is the debt of a factor created by his defalcation 'while acting in a fiduciary character,' as the meaning of this phrase is explained in *Chapman* v. *Forsyth*, unless the phraseology of the Act of 1867 has changed the sense of this phrase as it stood in the Act of 1841. The main portions of the section are in the same words in both acts, and the mere verbal differences between them do not seem to me to change their substantial import. * * * If this view is correct, as I think it is, then *Chapman* v. *Forsyth* conclusively determines the meaning of the Act of 1867, and excludes from the operation of the section the debt sued for here."

In the case of *Hennequin* v. *Clews*, 111 U. S., 565, decided in 1883, the debtors, Henry Clews & Co., received from Hennequin & Co. twenty-nine Toledo R. R. mortgage bonds for $1,000 each, to be held as security for a line of credit opened on the London correspondents of Clews & Co., in favor of Hennequin & Co. Clews & Co. hypotheticated the bonds to raise funds for their own use. Subsequently

Clews & Co. failed, and the bonds were lost and consequently were not surrendered to Hennequin & Co., although the latter had not, at any time, failed to protect all their bills, and were not in any way indebted to Clews & Co. at the time of the failure. In an action brought by Hennequin & Co. to recover the bonds or their value Clews & Co. pleaded in bar a discharge in bankruptcy. The court again reviewed their former decisions, reaffirming them, and quoted the above language from the opinion in *Chapman* v. *Forsyth* as decisive, and holding that Clews & Co. were not acting in a fiduciary capacity in their relation to the bonds or to Hennequin & Co.

This case will be referred to again on another branch of the question.

In *Grover & Baker Co.* v. *Clinton,* 11 Fed. Cases, No. 5845, the defendant was a sewing-machine agent who was to sell on commission, collect and remit monthly. He was short on settlement $1,600; failed in business and obtained a discharge in bankruptcy. The court held (Dist. of Wis.) that the debt was released, and cited the above case as decisive.

Noble v. *Hammond,* 129 U. S., 68 (621), holds that a debt collected from another person and mixed with collector's own funds without fraudulent intent is not of a fiduciary character.

Upshur v. *Briscoe,* 138 U. S., 375, follows *Hennequin* v. *Clews* and *Chapman* v. *Forsyth,* and holds that an instrument, relied upon as creating a trust, created, in fact, the relation of debtor and creditor and that the subsequent loss of the fund was covered by the discharge in bankruptcy of the obligor.

The courts of the following states have followed *Chapman*

v. *Forsyth* in its construction of the term "fiduciary capacity":

Alabama—

In *Anstill* v. *Crawford,* 7 Ala., 340, holding a factor not to be a fiduciary agent.

Woolsey v. *Cach,* 54 Ala., 383 (25 Am. Rep., 712), holding that a debt of a cotton factor for proceeds of cotton of his principal sold is not of a "fiduciary character."

Arkansas—

In *Sanders* v. *Sanders,* 56 Ark., 588 (20 S. W. Rep., 518), holding to a like construction of the State Constitution by analogy.

Florida—

Chipley v. *Fierson,* 17 Fla., 642, holding that the debt of a commission merchant for proceeds held by him was not contracted in a fiduciary capacity within the meaning of the Bankrupt Act.

Georgia—

Georgia R. Co. v. *Cubbedge,* 75 Ga., 323, holding that when one is invested with the effects of another to sell and dispose of for the benefit of the latter, his failure to account does not create a fiduciary debt.

Indiana—

Dupont v. *Beck,* 81 Ind., 274, holding that the obligation of a factor is not of a "fiduciary character."

Maine—

Phillips v. *Russell,* 42 Me., 361, holding that one entrusted with money to take to a distant place to pay a note did not act in a "fiduciary capacity" but as a bailee merely.

Massachusetts—

Hyman v. *Powl,* 7 Met., 330, following factor cases.

Halpin v. *May*, 100 Mass., 499, holding that a deposit of money with a broker for purchase of stocks to be accounted for on demand does not create a fiduciary debt.

See, also, to the same effect:

Cronan v. *Cotting*, 104 Mass., 245.

Woodward v. *Towne*, 127 Mass., 42.

Mississippi—

Green v. *Chilton*, 57 Miss., 599 (34 Am. Rep., 483), holding that the debt of a collecting agent to a bank for misappropriation of proceeds of notes placed in his hands for collection is not of a fiduciary character.

New Jersey—

Gibson v. *Gorman*, 44 N. J. L., 327, holding that a deposit received by an auctioneer from a purchaser was not received in a "fiduciary character."

New York—

In addition to *Hennequin* v. *Clews*, 77 N. Y., see the following to the same effect:

Palmer v. *Hussy*, 87 N. Y., 308.

Lawrence v. *Harrington*, 122 N. Y., 408, holding that conversion is not fraud within the meaning of the act, and the expression "fiduciary character" does not include implied trusts.

Mulock v. *Byrns*, 129 N. Y., 25.

Ohio—

Bissell v. *Couchine*, 15 Ohio, 64, holding that one who receives money to pay to another on a note of the employer and refuses to do so does not hold the money in a "fiduciary character."

Pennsylvania—

Curtis v. *Waring*, 92 Pa. St., 109, holding to the above construction of the term "fiduciary relation."

Scott v. *Porter*, 93 Pa. St., 40.

Tennessee—

Pankey v. *Nolan,* 6 Humph., 155, holding that an agent who retains money of his principal is not a fiduciary debtor.

Vermont—

Hammond v. *Noble,* 57 Vt., 200, holds to same ruling as to "fiduciary trusts" as *Chapman* v. *Forsyth.*

Slayton v. *Wells,* 66 Vt., 63, holds that no fiduciary relation exists between consignor and commission agent.

Illinois—

Wilson v. *Kirby,* 88 Ill., 570, cites with approval the decision of *Chapman* v. *Forsyth,* and quotes that part of the decision in full construing the term "fiduciary character," as used in the Bankrupt Act, and applies this construction by analogy to the construction of the term "a trust for any purpose," as used in a state statute.

To the same effect, see:

Straw v. *Jurgens,* 144 Ill., 507.
Shepherd v. *Furness,* 153 Ill., 590.
Pierce v. *Shippee,* 90 Ill., 376.

The last edition of the Am. & Eng. Ency. of Law sums the whole matter up in the following language (Vol. 16, p. 781):

> "Implied Trusts. Though there are some decisions to the contrary, it is now well settled that implied trusts do not come within the statutory provision under consideration (fiduciary relation), therefore a discharge releases all debts incurred by persons while acting as ordinary agents, attorneys at law, bailees, pledgees, brokers, factors and commission merchants, or any case where mere trust or confidence is reposed in the debtor, in the popular sense of the term."

That the decisions referred to apply with equal force to the Act of 1898 as to the Acts of 1841 and 1867 seems too

clear for argument; but we are not left to conjecture or doubt, as the Federal Court for the Southern District of New York, *In re Basch*, 97 Fed. Rep., 761, has passed upon the precise question. The opinion refers to many of the foregoing cases as decisive, and to others in the same line. Brown, J., says:

> "Under the prior bankruptcy acts of 1841 and 1867, after conflicting adjudications in the courts below, it became definitely settled by the decisions of the Supreme Court that debts excepted from the effect of a discharge in bankruptcy on the ground that they were created by fraud or defalcation, or while acting in a fiduciary capacity, did not embrace debts arising in commercial dealings between principal and agent or factor for the sale of goods on commission. * * * The provisions of Section 17 (4) of the present Bankrupt Act as to the debts excepted from the operation of the discharge are so nearly identical with the language of the preceding acts that those provisions must be deemed to be used in the sense adjudicated by the above decisions, so as not to except a debt or claim for a technical conversion or sale on commission, like the claim of the present creditor."

A like decision was rendered in the U. S. Circuit Court, W. D., Missouri, in *Bracken* v. *Milner*, 104 Fed. Rep., 522.

An examination of this case shows that the defendant was guilty of an intentional conversion of plaintiff's property in two capacities, one as an agent, and the other as a technical trustee. As to his conversion as an agent, his discharge was held to be a bar, but his conversion as a trustee was held to be within the exceptions of Subdivision 4, Sec. 17.

(2) But the defendant in error contends that the terms "fraud" and "embezzlement" as used in Subdivision 4 are not related to the words "officer" and "fiduciary capacity," but that they are to be construed as entirely distinct from

them, as much so, in fact, as if the latter terms were omitted and the terms "fraud," etc., stood alone; and that the character of his claim is such as to be within the legal meaning of the term "fraud" as construed by the authorities.

In reply we say that the terms "fraud," "embezzlement," "misappropriation," and "defalcation" are all related to the terms "officer" and "fiduciary capacity," one term as much as the other, and that the plain reading of this subdivision and its grammatical construction will admit of no other interpretation.

It is admitted that the terms "misappropriation" and "defalcation" are so related. What now is there in the punctuation or construction of the sentence to disassociate the other terms? The word "or" which precedes the word "defalcation" is not a term of separation, but is rather a conjunction, and if used between each of the other terms would not change the construction.

Referring back to Subdivision 2 we find the word "or" so used, and no one will question but that all the kindred terms of this subdivision are related to the word "judgment" and are not to be separated from it.

The defendant in error argues in this behalf that Subdivision 4 is substantially the same as the corresponding part of the Act of 1867, where "fraud" and "embezzlement" were rightly construed as not related to the terms "public officer" or "fiduciary capacity," but stood out separate and apart from them—independent of them.

Place the two acts side by side and a radical difference in this respect is quickly seen. Here they are:

Sub. 4, 1898: "Were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

Act of 1867: "That no debt created by fraud or em-

bezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary capacity," etc.

"Fraud" and "embezzlement" in the Act of 1867 are seen at a glance to be used independently and apart from "officer" and "fiduciary capacity," and the term "defalcation" only to be related to the latter term. While under the Act of 1898 "fraud," "false pretenses," "false representations," "wilful and malicious injuries," "embezzlement," "misappropriation," and "defalcation" are *not* so separated and independent, but are related either to "judgments" in Subdivision 2 or "officer" or "fiduciary capacity" in Subdivision 4.

The decisions of the Federal Courts support our view of this question.

In *In re Rhutassel*, 96 Fed. Rep., 599, Judge Shiras said:

> "If the Bankrupt Act provided that claims created by fraud, false statements, or false pretenses were excepted from the bar of a discharge, then the mere fact that the claim had been put into judgment might not preclude the holder thereof from proving its original and essential nature, in order to enable the court to determine whether it came within the exceptions of the statute. *Wisconsin* v. *Eplican Ins. Co.*, 127 U. S., 265, 8 Sup. Ct., 1370. Thus, if the bankrupt, while acting in an official or fiduciary capacity" (note that the court uses these terms in relation, as we claim they should be), "misappropriated money coming into his hands, and a judgment for the amount misappropriated or embezzled had been renderd against him in an action for money had and received, the merger of a claim into a judgment of that form would not debar the owner of the claim from showing, as against a plea of a discharge under the Bankrupt Act, that the claim or debt now evidenced by the judgment was one created by the fraud, embezzlement, misappropriation, or defalcation

of the bankrupt while acting in an official or fiduciary capacity, because the last clause of Section 17 of the act excepts from the operation of a discharge provable debts created by the fraud, misappropriation or embezzlement of one acting in an official or fiduciary capacity." (Note the relation of the terms again.) "The point of inquiry under this clause of the act is, how was the debt created, not in what form is it now evidenced? Under the second clause of Section 17, the question of the form of the debt as well as of its original nature, is an essential in determining whether the particular debt will be barred by a discharge, or whether it is protected against the bar of the discharge, by coming within the exceptions created by this clause of the section. The second clause of this section does not except out from the effect of discharge claims created by fraud, or by obtaining property by false statements, or by wilful and malicious injuries to the person or property of another, but does except out judgments rendered upon causes of action of the named nature; and, therefore, to come within the exception it must appear that the creditor holds a judgment, which was rendered in an action for fraud. * * * It is apparent that if it had been enacted that a discharge should not bar claims or debts created by false pretenses or false statements, such a provision would have been a fruitful source of litigation in the future, and would have subjected the bankrupt to constant worry and pressure from creditors claiming that the debts due them had in fact been created by false statements with respect to the financial condition of the debtor, and were, therefore, not within the bar of the discharge; and hence the wisdom of the provision that limits the exception to judgments which show on their face that the claim merged therein was based on the fraud of the bankrupt."

In *In re Hirschman*, 104 Fed. Rep., 69, Judge Marshall says:

"Section 17 of the Act prescribes the provable debts which are not released by a discharge in bankruptcy. Among such debts judgments in action for certain torts are mentioned; but no cause of action for a tort not reduced to judgment is excepted."

In the case of *In re Lewinsohn*, 99 Fed. Rep., 74, the bankrupt applied to the Federal Court for an order staying proceedings in a state court on certain warrants that had been issued for his arrest. In the decision of the matter before him, Judge Brown suggests both constructions now under discussion, and says:

"Paragraph 4 may be regarded as merely a substitute for Section 5117, Rev. St., and thus applicable to frauds generally; and Subdivision 2 as respects frauds to be designed merely to remove the doubts which arose under the Act of 1867. Whether a judgment for such frauds by merger of the original debt did not make the discharge operative upon it."

Which is the view of the defendant in error.

"On the other hand, Subdivision 2 might be construed as requiring for all frauds other than official or fiduciary ones, judgments should be obtained in order to prevent their being barred."

This is the view of plaintiffs in error.

He does not adopt either view, but enters an order (p. 76) finding, among other things, that

"Upon the bankrupt's giving a bond to that effect, with approved security, the stay should be continued for a period not exceeding twelve months from the date of adjudication, unless an application for discharge be then pending, and in that case until the final determination of that application."

This is the customary form of the order entered under Sec. 11 of the Act of 1898. This section reads as follows:

> "Sec. 11. Suits by and against bankrupts. (a) A suit which is founded upon a claim from which a discharge would be a release and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudicated a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then, until the question of such discharge is determined."

It appears that an order of stay was granted by the Federal Court in the case at bar. Inferentially it must have been granted upon the theory that the demand of the defendant in error is one "from which a discharge would be a release."

In *Hargadine-M'Kittrick Dry Goods Co.* v. *Hudson,* 111 Fed., 361, the court, after quoting the corresponding sections of the Acts of 1867 and 1898, says:

> "The difference in language is striking. Under the old law, no debt created by fraud or embezzlement of the bankrupt was discharged by proceedings in bankruptcy, but in the present act it is 'judgments in actions for fraud or obtaining property by false pretenses or false representations, or for wilful or malicious injuries to the person and property of another' which are not released by discharge in bankruptcy."

In *Morse & Rogers* v. *Kauffman,* 40 S. E., 916 (Va.), the declaration charged the defendants with procuring goods under false pretenses, false representations, etc. The defendant set up a discharge in bankruptcy. The plaintiff demurred on the ground that the action was in tort, and

the claim not barred by the statute. The Supreme Court of Virginia, in passing upon the question, says:

"This case involves the consideration of paragraphs 2 and 4 of Section 17 of the Bankrupt Act of '98. * * But the provisions of the Act of 1898 are essentially different from those of the act of 1867 in respect to debts which are not to be affected by discharge in bankruptcy. The subdivisions of Section 17 of the act, bearing upon the question under consideration, are as follows: (Quoting second and fourth subdivisions.)

"It will be observed that the first part of Section 33 of the Act of 1867, in relation to debts created by fraud, is carried into paragraph 2 of Section 17, *supra*, with the qualification that there must be a judgment in actions for frauds, while the latter part of Section 33, in respect to fiduciary debts, is incorporated in paragraph 4.

"Plaintiff's claim is not within the exception of paragraph 2, because no judgment had been obtained upon it in an action for fraud. The manner in which the demand is evidenced, as well as its original nature, is an essential ingredient in determining whether or not the particular debt will be barred by a discharge.

"Subdivision 2 does not except from the operation of a discharge claims created by fraud, or by obtaining property by false statements or by wilful and malicious injury to the person or property of another, but judgments recovered in actions for fraud on claims arising out of those conditions.

"By the plain language of the paragraph, the demand will be barred by a discharge in bankruptcy, unless reduced to judgment, and unless the judgment, read in connection with the pleadings in the case, shows that it was recovered in an action for fraud, or obtaining property by false pretenses or false representations, or wilful and malicious injuries to the person or property of another. This construction was placed upon the enactment by the District Court of the United States for

the Northern District of Iowa, in a well-considered opinion. *In re Rhutassel,* 2 Am. Bankr. R., 697, 96 Fed., 597.

"In that case the wisdom of the limitation is commended as a protection to bankrupts against constant worry and pressure from creditors claiming that debts due them had been created by false statements with respect to the financial condition of the debtor."

In *Gee* v. *Gee,* 87 N. W., 1116, the court says:

"As distinguished from the previous United States Bankruptcy Acts, the Act of 1898 provides for two separate classes of exceptions from the discharge of the bankrupt, viz., one in which judgment must be for fraud, and the other in which the debt must have arisen upon embezzlement, misappropriation or fraud in a fiduciary capacity. It is probable, as held in *In re Rhutassel,* 96 Fed., 587, that it was the purpose of the present Bankrupt Act to provide that, in the first class of cases, the fraud should be shown or evidenced by a judgment, or at least disclosed in judgment roll, while in the case of debts through fraud in a fiduciary capacity, proof of the fiduciary capacity would furnish test of the exception which would apply to cases of violation of express trusts."

In *In re Bullis,* 73 N. Y. Sup., 1048, the Appellate Division of the Supreme Court of New York, in the course of its opinion, uses the following language:

"The counsel for the respondent devotes much space in his brief to an argument that subdivision 4 of Section 17, applies to this appeal. The position is that the terms 'fraud,' 'embezzlement,' 'misappropriation,' in that subdivision, relate to an individual, while the word 'defalcation' alone applies to one 'acting as an officer or in a fiduciary capacity.' We cannot assent to that construction. In the corresponding section (33) of the Act of 1867, the interpretation contended for may have been tenable. In the present section, however, the ex-

ceptions have been remodeled and reclassified, and the intention apparently was to make subdivision 2 applicable to frauds, etc., perpetrated by an individual failing debtor, but protected him by limiting the prohibition against his discharge to frauds, false representations, etc., embodied in a judgment and provable by the record. Subdivision 4 was then designed to relate to an officer, or one acting in a trust capacity, and was enlarged in its scope by erecting a barrier to the discharge of such a culpable debtor, who had been guilty of 'fraud, embezzlement, misappropriation,' as well as 'defalcation.' A person faithless in a public or trust capacity, is the more flagrant malefactor, and hence it may have been deemed advisable to extend the barrier to his receiving the benefit of a discharge permitted by the statute to include the other delinquents named. The natural rendition of subdivision 4, as well as its grammatical construction, seems to favor this interpretation. If any debt created by fraud, embezzlement or misappropriation is to be excepted from the application of the statute, then there is no necessity for subdivision 2, making a judgment essential to prevent the granting of the discharge under the statute. The bare proving the debt was created by fraud would be sufficient to raise a bar to the release of the insolvent therefrom, which would be tantamount to emasculating subdivision 2."

In *Harrison et al.* v. *Herman,* 72 S. W., 546, the Supreme Court of Missouri says that:

> "The provision of the Bankrupt Act of 1898 must be construed to mean what it says—that it is *judgments* in actions for fraud, and *not debts* created by fraud, as in the Act of 1867, which are not to be affected by the discharge in bankruptcy."

The Supreme Court of New Jersey in *J. C. Smith & Wallace Co.* v. *Lambert,* 55 Atl., 88, says:

"We think, however, that under Section 17 of the Bankrupt Law to which reference has been made, there is no provision that would except from the discharge the *debt* upon which the present suit is brought. Clause 2 would not include it, for the reason that it applies to *judgments* alone and not to simple contract debts. Clause 3 (4) will not include it for there the debts excepted are such as were created by the fraud, etc., of the bankrupt *while acting as an officer or in any fiduciary capacity.*"

The defendant in error urges that no such construction should be given to this act as will destroy a creditor's remedy when his property rights have been invaded. It must be remembered, however, that bankrupt laws always work ruthless destruction of creditors' rights and remedies. Such laws are never passed in the interest of the creditor class, but wholly in the interest of the debtor class. The only benefit to the creditor class, if any, comes through the administration of the bankrupt's estate, if there be one. But whether there be one or not, the debtor may have the full benefit of the law.

The legislative purpose in enacting a bankrupt law is to serve the public good, by reinstating to usefulness in the family and in the social and business world a debtor so burdened with debts and obligations that his reinstatement would otherwise be impossible, and courts have always construed these laws liberally in that behalf.

Mr. Justice Hunt, in *Allen* v. *Ferguson*, 85 U. S., 1, uses the following pertinent language:

"The law holds it to be right that a debtor shall devote his entire property to the payment of his debts, and when he has done this that after-acquired property shall be his own, to be held free from the obligation of all his debts, just debts as well as unjust, principal

debts as well as security debts. Neither the Supreme Will, so far as we can ascertain it, nor the laws of the land, require that a debtor whose family is in need, or who is himself exhausted by a protracted struggle with poverty and misfortune, should prefer a creditor to his family; that he should appropriate his earnings to the payment of a debt from which the judgment of the law has released him rather than to the support of his family or to his own comfort."

III.

Assuming for the purposes of the case that the term "fraud" as used in Subdivision 4 of Section 17, is not limited and confined to the fraud of an officer or of one acting in a fiduciary relation, but is to be construed as separate and distinct from the language that follows it in that subdivision, then it must be made to appear, of course, that the claim of the defendant in error is of such a character as to fall within the meaning of the term "fraud" as there used. The term "fraud" as used in the several bankrupt acts has been construed by all the authorities to mean an active express fraud, and not one implied from an unjustifiable or illegal act. A positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not mere fraud in law—a technical or constructive fraud—which may exist without the imputation of bad faith or immorality.

It is only under the extravagant allegations of the declaration that the defendant in error can, or does, claim that his demand falls within the terms of the legal definition of "fraud" as used in the act; that by their plea of *puis darrein continuance*, setting up their discharge, the plaintiffs in error have admitted such allegations to be true in all their extravagance; that the court, in arriving at its judgment, must disregard the evidence, although introduced by the de-

fendant in error himself—evidence, too, which is descriptive of the character of his claim. In other words, the defendant in error insists that a court sitting to administer justice according to law and fact must in the presence of the solemnly attested truth, formally admitted into the case by the court, and the positive act of both parties, disregard the evidence of such attested truth and base its decree upon a palpable falsehood, contained in an unsworn declaration, in order to satisfy the technical requirements of an antiquated feature of the machinery of practice.

However, the evidence is properly before the court on the issues raised by the plea *puis* of plaintiffs in error, and the replication thereto. These issues necessarily involve the real character of the demand of defendant in error. Upon such an issue the court must know the real character of the demand in question in order to determine whether or not it falls within any of the exceptions of Section 17.

And in refusing to consider and pass upon the evidence the trial court committed serious error to the prejudice of the plaintiffs in error.

The plea *puis* alleges, among other things (Abst., 31-32):

> "That the several supposed causes of action in the said declaration, and in each count thereof mentioned, are in respect of debts and claims, and each of them is in respect of a debt or claim made provable by said acts of Congress relating to bankruptcy against the estate of the said defendant (Richard C. Crawford, Edward A. Valentine), and the same were provable against his (their) estate, both individually and copartnership as aforesaid; that the said supposed causes of action are not, nor is any one of them, in respect of any such debts or debt as are or is by the said acts excepted from the operation of a discharge in bankruptcy."

The plaintiff's replication to the plea alleges (Abst., 33):

> "That the several causes of action in the declaration mentioned and the cause of action in each count thereof mentioned, are not, and is not in respect of debts or claims, nor is any or either of them in respect of a debt or claim, made provable by the acts of Congress relating to bankruptcy, etc. * * *; and the plaintiff says that said causes of action and each of them is, in respect of such debts, claims, demands or damages as are, or is, by the said acts of Congress excepted from the operation of a discharge in bankruptcy, and are not causes of action, nor is any or either of them a cause of action, in respect of any such debt, claims, demands or damages as are not by the said acts of Congress excepted from the operation of a discharge," etc.

Here are presented distinct issues of fact to be tried and determined upon evidence. The origin and character of the claim of defendant in error is thus brought in question as a fact. That the evidence admissible under the plea *puis* and the replication is the same as it would have been under the declaration and a plea of general issue is a mere coincidence, and does not, or should not, destroy the right of plaintiffs in error to try the issues as made in the case. That there were issues of fact to be tried was the view of defendant in error at the outset, and he assumed the burden of proof upon such issues by introducing a mass of testimony as to the origin and character of his claim. He should not now be permitted to withdraw all such evidence from the consideration of the court to the manifest prejudice of the plaintiffs in error; nor should the court have rejected it in arriving at its decision, nor should the court have refused to admit evidence on such issues offered by the plaintiffs in error.

Then, too, the evidence is admissible and must be considered under the well-known rule of pleading that when a pleader asserts a right based upon a statute containing an exception he must allege and prove that he is not within such exception.

Chitty says (Chitty on Pleadings, 246):

> "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption. * * * And Lord Tenterden said, 'if an act of parliament, or a private instrument, contain in it, first, a general clause, and afterwards a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception But if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception, and if he state it as containing an absolute, unconditional stipulation, without noticing the exception, it will be a variance,'" etc.
>
> *Clough* v. *Shepherd*, 31 N. H., 490.
> *Teel* v. *Fonda*, 4 John., 304.

Here the law on which the plea is based reads as follows:

> "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such," etc.

The court is reminded, too, in this connection, that the evidence is without conflict. No fact testified to is disputed.

From the evidence it appears in brief that the defendant in error was never the owner in fact of any specified shares of stock, whether of Metropolitan Traction or of other kinds; that he never had any such stock in his actual possession or

under his control; that the Philadelphia brokers, through whom all the stock was "purchased," paid for it and held it on account of plaintiffs in error, and not on account of Mr. Burke, the latter not being known in the transaction; that the stock was so held by the Philadelphia brokers as collateral to the indebtedness of plaintiffs in error to them, all to the knowledge of defendant in error; that throughout the entire time of Mr. Burke's stock speculations, through the plaintiffs in error and their predecessors, and of all the many kinds of stock he pretended to purchase through them, he never had in his actual possession, nor was he able to identify as his, a single share; that while the book or apparent value of his stock transactions amounted to hundreds of thousands of dollars, his actual payments on the same, or investments in that behalf, were relatively trifling; that he never asked the delivery to himself of any share of stock directly or indirectly until after he learned of the failure of the plaintiffs in error; that books of account were kept between the parties wherein entries were made of all stocks bought and sold, of "margins" paid, and of losses sustained and profits made, from which monthly balances were struck and monthly statements rendered, indicating in the clearest manner that the relation of debtor and creditor existed between them, and that such was the understanding; that the relations of the parties and the manner in which their mutual transactions were carried on from first to last indicate in the strongest possible way that Mr. Burke never intended or expected to actually pay for or receive any stock through Crawford & Valentine, nor Crawford & Valentine to actually deliver to him any such stock, but that by tacit agreement all settlements between them, touching these stock transactions, should be made on the basis of market differences.

If under these circumstances the plaintiffs in error are

guilty of "fraud" by converting the property of defendant in error, such "fraud" is one of law rather than of fact, and does not involve that moral turpitude which the courts say must exist to bring their act within the exceptions of Section 17.

In *Neal* v. *Scroggs* (Clark), 95 U. S., 704, the defendant was held guilty of constructive fraud in purchasing bonds at a discount from the executor of an estate. His discharge in bankruptcy was held to be a bar in an action to recover, because such fraud did not involve moral turpitude, etc.

Judge Harlan, writing the opinion of the court, after discussing the questions as to whether or not a fiduciary relation existed and holding that it did not, says:

> "Applying these rules to this case, we remark that in the section of the Law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusions that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system."

The facts in *Hennequin* v. *Clews*, 111 U. S., 565, have already been alluded to. The bonds there in question were the property of Hennequin & Co., and came from their actual possession when deposited with Clews & Co., as collateral

security for Hennequin & Co.'s contingent liability. Clews & Co., while the bonds were so in their possession, and without the knowledge or consent of Hennequin & Co., appropriated them to a totally different use, viz., to secure an actual indebtedness of their own to others with whom Hennequin & Co. had no connection. The bonds were lost to Hennequin & Co. through this act. That the facts in *Hennequin* v. *Clews* make a far stronger case of fraud within the meaning of the act than do the facts in the case at bar, is too evident for argument.

Justice Bradley, writing the opinion of the court, says:

> "We have to decide the question whether the Act of 1867 operates to discharge the bankrupt from a debtor obligation which arises from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and his failure or refusal to return the same after the money has been paid or the duty performed, or whether a debt or obligation thus incurred is within the meaning of the 33rd section of said Act, which declares that 'no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act.' The New York courts decided that the effect of the discharge in bankruptcy was to discharge the debt, holding that the debt was not created by fraud nor by embezzlement, nor whilst the bankrupt was acting in a fiduciary character."

After discussing and approving the rule as to "fiduciary capacity" laid down in *Chapman* v. *Forsyth* and the rule laid down in *Neal* v. *Scroggs*, defining the term "fraud," the opinion continues:

> "The present case is not precisely like either that of *Chapman* v. *Forsyth*, or *Neal* v. *Scroggs* (Clark), but it is very difficult to distinguish it in principle from

the cases of commission merchants and factors failing to account for the proceeds of property committed to them for sale. There is no more, there is not so much of the character of trustee in one who holds collateral securities for a debt as in one who receives money for the sale of his principal's property—money which belongs to his principal alone, and not to him, and which it is his duty to turn over to his principal without delay. The creditor who holds a collateral holds it for his own benefit under contract. He is in no sense a trustee. His contract binds him to return when its purpose as security is fulfilled, but if he fails to do so it is only a breach of contract and not a breach of trust."

In the case at bar the stock to which the defendant in error makes claim was all the time in the possession of the Philadelphia brokers as collateral to Crawford & Valentine's indebtedness, with the knowledge and approval of Mr. Burke, and pursuant to the manner in which the business was being done.

In *Noble* v. *Hammond*, 129 U. S., 68, the debtor, a produce dealer, collected money for the accommodation of the plaintiff to keep until called for and deposited the same in bank to his own credit and with his own funds. He failed before it was called for, obtained his discharge in bankruptcy, and pleaded the discharge in bar of plaintiff's action to recover on the ground of fraudulent conversion.

The court reviews with approval the cases of *Neal* v. *Scroggs*, *Wolf* v. *Stix*, and *Hennequin* v. *Clews*. Justice Lamar in the opinion says:

"The finding of the jury that the agreement of the plaintiff in error was to collect the money and keep it until the defendant in error called for it, can not be taken to imply an obligation to keep and deliver to them the identical bills or coins, * * * nor can the sub-

sequent mingling by the plaintiff in error of the money collected with his own constitute the actual, positive fraud contemplated by that Act, but only such an implied fraud as is involved in most or all cases of conversion of property or of breach of contract."

In *Upshur* v. *Briscoe*, 138 U. S., 138, the defendant was an attorney appointed by a written instrument to receive moneys for the benefit of another, and to pay over to such other the interest from year to year during her life, and at her death to pay the principal to her legal heirs. He failed to pay over the principal and a portion of the interest, was adjudged a bankrupt, obtained his discharge, and pleaded it in bar of an action in tort brought by those entitled to the principal. The court in its opinion reviews the authorities and holds that the defendant did not sustain the relation of trustee—was not acting in a fiduciary capacity—that the relation created "was merely the usual one of contract between debtor and creditor," and that he was not guilty of "fraud" within the meaning of the Act.

In *Keime* v. *Graff*, 14 Fed. Cas. No. 7650, the defendants were commission brokers to whom the plaintiff had conveyed cheese to be sold on commission. The cheese was sold and an account of sale rendered. Plaintiff was authorized to draw, which he did, but draft was dishonored. Defendants failed, obtained a discharge in bankruptcy, which was held to be a bar to plaintiff's action. The court says:

> "Now the default of a factor in not making payment to his principal is not a fraud within the meaning of the thirty-third section of the Act of 1867, as shown by *Neal* v. *Scroggs*," etc.

In *Bracken* v. *Milner*, 104 Fed. Rep., 522, a decision under the Act now in force, the plaintiffs made arrangements with the defendant to loan money for them, secured by mort-

gages or deeds of trust—the notes and securities to be sent to the plaintiffs. The defendant was to look after the securities, make collections and remit promptly. The transactions following this arrrangement covered a long space of time and became unsatisfactory to the plaintiff, who upon investigation found that the defendant had collected his moneys and appropriated the same to his own use. It appeared that in some instances he had caused the deeds of trust, taken as security, to be executed to himself, and had subsequently collected the principal and converted the money so collected. In some instances he had collected interest, as stated, on other securities, and converted the same. The court in rendering its decision says:

> "The conduct of the defendant in respect of his stewardship is so reprehensible that at the hearing of this case the inclination of my mind was to hold him liable on all of these claims, but an examination of the rulings of the Supreme Court on kindred statutes has unsettled these first impressions. * * * He was simply under contract obligation to remit as fast as collected. The defendant did not misapply the money sent him. He loaned it on approved securities. His default arose on failure to remit, as a mere agent, in some of the cases sued on. The court, therefore, holds that in respect of the collections made by the defendant independently of his trusteeship in the deed of trust, and in the absence of positive fraud his liability therefor is relieved by his discharge in bankruptcy. A different question arises in the instances where the defendant was trustee in some of the deeds of trust, which he of his own motion foreclosed, and appropriated the money arising from the sales. * * * He had himself made trustee in certain of the deeds of trust, and thereby accepted the office. As such he was trustee of an express trust, and was therefore acting under a technical trust created by an instrument of writing. * * * He received

the money under the foreclosure only as a technical trustee, and was bound by his office as such to pay *over to the cestui que trust.* * * * In other words, he received such money while acting in the strictest sense in a "fiduciary capacity." His liability, therefore, in these causes of action is not relieved by his discharge in bankruptcy."

In *Burnham* v. *Pidock,* 68 N. Y. Supp., 1009, a case under the present Act, the court says:

"This action is brought for the conversion of goods. It is not essentially an action for fraud, and the cause of action does not necessarily depend upon any positive fraud, but it only requires proof of an improper interference with the property of another; and although fraud may incidentally be at the foundation of that interference, yet the judgment is one of conversion, and can not be said to be one of fraud. It is quite true in this particular case the learned court in New Jersey, in determining the motion for a new trial, *said that the act of the defendant which made him liable for the conversion was fraudulent; but that statement does not change the nature of the record,* nor can the opinion of the court be taken as proof that fraud necessarily lay at the foundation of the action, even if that could be established outside of the record, which we do not think. The fraud which will prevent the operation of the discharge in bankruptcy must be, as said in the case of *Hennequin* v. *Clews, 'positive fraud or fraud in fact, involving moral turpitude or intentional wrong,'* and it is necessary that that fraud should be the essential part of the cause of action without the proof of which the plaintiff can not recover. There was no such fraud in this case, and therefore the judgment of the learned court below was correct and must be affirmed."

In *In re Benedict,* 75 N. Y. Supp., 165, the action was one for conversion of money by the defendant received by

him as sales agent for the plaintiff. The court after quoting Section 17 of the pending Bankrupt Act, says:

"This section of the bankrupt law has been recently construed by the appellate division for the First Department in *Burnham* v. *Pidock*, 58 App. Div., 273, 68 N. Y. Sup., 107, in which it was held that a judgment obtained in an action for the conversion of goods was one discharged in bankruptcy, and not within the exception of the Act. *In re Basch* (D. C.), 97 Fed., 761, Brown, district judge, construed the exception not to include a claim against a merchant who failed to account for the value of goods consigned to him for sale on commission, on a contract to return the goods or their specific proceeds, and held that such a claim could not be said to be created by the bankrupt's fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity, and hence was released by the bankrupt's discharge. In *Bracken* v. *Milner*, 5 Am. Bankr. Rep., 23, 104 Fed., 522, in an exhaustive review of the authorities, Phillips, district judge, decides that the debts referred to in Section 17, Subdivision 4, above quoted, are those arising in the administration of a technical trust, and do not include a debt by reason of the failure of a bankrupt to remit money collected by virtue of a mere contract of agency to collect and pay over to his principals money loaned by him for them. In *Knott* v. *Putman*, 6 Am. Bankr. R., 80, 107, it is held that a debt arising from nonpayment by a cotton broker of proceeds from cotton purchased and sold by the bankrupt is dischargeable, and not within the exception. The theory of the above decisions is that, although conversion may be an implied fraud, yet the term "fraud" as used in the bankrupt law means a positive fraud—a fraud in fact—which is the gravaman of the action, and not implied fraud, or fraud in law, and that the term 'fiduciary capacity' used by the statute refers to technical trusts, and not those which the law implies from contract.

These decisions are based not only upon the strict language of the Bankrupt Act, but upon the holdings of the courts under the former bankrupt law. The provision of that law was, as to exception from discharge, as follows:

"'No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged by proceedings in bankruptcy.'

"Under the above provision it was held in *Mulock* v. *Byrnes,* 129 N. Y., 23, 29 N. S., 244, that a judgment recovered on an indebtedness incurred by failure to pay over rents collected by the bankrupt as agent, was barred by his discharge in bankruptcy."

"In the present case the bankrupt did not * * * come into possession of the goods of the plaintiff by fraud or false representations. They were consigned to him, and his possession was a lawful one. By his contract with the plaintiff it became his duty to account for the proceeds of sales made by him. He failed to do this and converted the money to his own use. It would seem under the authority of the above cases, that the judgment was one which was dischargeable by bankruptcy proceedings. Under both theories, therefore, that the debt is one dischargeable by bankruptcy proceedings, and that, if it is not, it has no preference over other debts—the motion must be granted."

In *In re Gaylord,* 113 Fed., 131, 135, the bankrupts were stock brokers, as in this case. The court says:

"The definition of a provable debt (Section 63 of the Act of 1898, *supra*) seems also to satisfactorily determine that the obligation of the bankrupts to Gilbert is a debt within the meaning of the act. It is undoubtedly founded upon an open account, and likewise creates an implied promise or contract on the part of the bankrupts to pay any balance appearing thereby to be due to Gilbert. According to the definition aforesaid, an

obligation 'founded upon an open account, or upon a contract, express or implied,' is a provable debt under the bankruptcy act. There is no showing that the bankrupts kept Gilbert's money by itself. On the contrary, it sufficiently appears that the same was intermingled with that of other customers as well as that of the bankrupts themselves. The parties permitted the account to run for months in such a way as to clearly indicate their purpose to establish the relation of debtor and creditor between themselves."

In *Crosby* v. *Miller, Von & Co.*, 25 R. I., 172 (S. C. 55, Atl. 328), the plaintiff had obtained judgment against the defendants for the conversion of certain securities placed in their hands by her, and the defendants having been discharged in bankruptcy moved a stay of execution on the judgment. The court first discusses the relation between the parties and concludes it was not of a fiduciary character, citing many authorities already referred to in this brief, and then says:

"An action of trover and conversions is not an action for fraud. *Watertown Carriage Co.* v. *Hall*, 7 Am. Bankr. R., 716, 72 N. Y. Supp., 466; Collier on Bankruptcy, 178; *Burnham* v. *Pidock*, 5 Am. Bankr. R., 42, 66 N. Y. Supp., 806, affirmed on appeal, 5 Am. Bankr. R., 590, 68 N. Y. Supp., 1007. See, also, *In re Bullis*, 7 Am. Bankr. R., 238, 73 N. Y. Supp., 1047. The word 'fraud,' in the meaning of the Bankruptcy Act of 1867, means positive, or fraud in fact, involving moral turpitude or intentional wrong; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. *Neal* v. *Clark*, 95 U. S., 704, 24 L. Ed., 586. In *Hennequin* v. *Clews* the court held that a broker who failed to return stocks pledged to him as collateral security did not commit fraud in the meaning of the law. *The word has the same meaning in the Act of* 1898. *In re Blumberg*

(D. C.), 94 Fed., 476; *In re Rhulaessel* (D. C.), 96 Fed., 597; *Western Union Cold Storage Co.* v. *Hurd* (C. C.), 116 Fed., 422. The discharge in bankruptcy therefore operates to cancel this judgment, and the execution must be perpetually stayed."

The plaintiffs in error, through their Philadelphia brokers, were in the *lawful* possession of the stock in question at the time they are alleged to have *unlawfully* converted the same. Under such circumstances an act of conversion is not an act of "fraud" within the meaning of the Bankrupt Act.

This is inferentially held in nearly all the cases just referred to, and directly held in

Hennequin v. *Clews*, 111 U. S., 565.

Burnham v. *Pidock*, 66 N. Y. Supp., 806 (s. c. Appellate Branch 68 do, 1007).

Watertown Carriage Co. v. *Hall*, 72 N. Y. Supp., 466.

Crosby v. *Miller*, 25 R. I., 172 (s. c. 55 Atl., 328).

Western, etc., Co. v. *Hurd*, 116 Fed., 442.

In *Burnham* v. *Pidock* (66 N. Y. Supp., 806), the court says:

"If there are no wrongful *taking*, but a subsequent conversion, it was of necessity "wrongful," because it was illegal, but it was *not* necessarily fraudulent. * * * Following the decisions of the Federal Courts it must be held that the judgment sued upon though founded on 'wrongful conversion' is *not* necessarily one rendered in action either for fraud or for wilful and malicious injuries to the person or property of another, within the meaning of the Act."

In *Crosby* v. *Miller*, the Supreme Court of Rhode Island says:

"An action of trover and conversion is *not* an action for fraud" within the meaning of the Bankrupt Act.

IV.

The relation betwen the parties to this action during the time of their mutual dealings was purely contractual, and the utmost that defendant in error can claim, under such contract relation, is that the plaintiffs in error assumed an obligation of "carrying" for his benefit an investment for profit in a defined quantity of a certain stock, but no particular shares, and at some future or indefinite time to cause to be delivered to him certain certificates of such stock, when paid for by him, or in lieu thereof to account to him for the profits of his investment, to be determined by the market prices after the customary manner of the business with which all parties were well acquainted; and the defendant in error as a part of his contract obligation was to "margin" the stock after the manner of the trade, and as the markets demanded from time to time, to protect the plaintiffs in error against loss from a falling market, and to pay the plaintiffs in error a small commission for their services. The defendant in error kept his part of the bargain and the plaintiffs in error did not, but failed and sought the benefit of the bankrupt law. Hence this lawsuit. Hence this *form* of action.

Let us consider for a moment the question of the form of action.

It is true that there is a class of cases in which, although the action arises from the breach of a contract, the plaintiff has the choice of an action in tort or an action *ex contractu;* but in that class of cases the present one we contend does not belong. That class of cases includes only those in which the law imposes certain obligations upon the defendant really independent of the contract, but existing by virtue of his entering into the contract; the most familiar example of such a case being in the matter of common carriers. The

plaintiff has always endeavored to bring his relations with the defendants within this class of cases. The relation, he says, which the defendants sustained towards the plaintiff, was that of brokers and pledgees, and in one of his briefs, heretofore filed in the Circuit Court in this controversy, he says that "as such the law imposed upon them certain duties and obligations which they were required to perform," and that the question was, "did they perform the duties and obligations so imposed?" Mr. Burke's statement is not correct. That the defendants entered into a contract with Mr. Burke is perfectly true. That in consequence of their unfortunate business experience and insolvency they defaulted upon their contract, is also perfectly true. That this was unfortunate for Mr. Burke, and that his feeling of grievance caused thereby is natural, is also true; but all that gives him no right to recover in an action of tort, nor does it establish the fact that there has been a violation of a trust. The question is not even whether or not the defendants in every respect managed their business in accordance with the most approved methods of brokers, nor whether they speculated recklessly, nor whether they had insufficient capital. Our clients steadfastly maintain that all their transactions were such as were known and approved as "regular in the trade"; but the contrary might be admitted, and yet the only remedy for the plaintiff below might be an action in assumpsit for breach of contract. Every breach of every contract may be said to be wrongful. At all events, contracts entirely justifiably made and rendered impossible of execution by sheer misfortune and without any fault whatever of the contracting party, furnish few law suits, either in assumpsit or in any other form of action. Where there are such contracts in which the defaulting party is absolutely without fault, the relief offered by courts of law is

seldom considered necessary. It is very probable that should any of the counsel in this case undertake to set up a stock brokerage business, there would be much less business done upon the capital involved, less risks taken for impecunious customers in speculative stocks, no private wires between Chicago and the seaboard and no personal speculations in stocks in which customers were speculating, or, to put it in words that more truthfully express the situation, no personal wagers on the market on the other side of that upon which the bets of the customers had been registered. But such an admission as that involves no admission of the correctness of the plaintiff's position. Against it, we assert that the relation which the defendants sustained towards the plaintiff was not that of pledgees and that the law imposed upon them no duties and obligations except those duties and obligations which by contract they have undertaken. Of course in one sense the law imposes upon every man the duty of observing his contracts; but the remedy for the violation of that duty is in assumpsit and not in tort. Irrespective of all else, therefore, in the case, we insist that the first five counts of the declaration, *upon which alone the court below rendered judgment,* must fail, for they involve this unwarranted assumption on the part of the plaintiff, that the defendants were "pledgees" or "trustees" of certain property, the legal or equitable title to which was in him, for which property, because it was not given to him (although by his own testimony it would appear that he never demanded it, nor tendered what he himself claims was due upon it to the defendants) he can maintain what is to all intents and purposes an action in trover. This we specifically deny.

But if, in the present state of the pleadings, the question of the form of the action is not involved, as we believe it to be, the question of whether there was in the transactions,

as shown by plaintiff's own evidence, out of which this indebtedness grew, positive and actual fraud involving moral turpitude, certainly is. Upon both of these questions, therefore, it is necessary to discuss the facts and the legal inferences which appear from them.

Undoubtedly the plaintiff below, as we indicated in our "Statement," will, in this court, as he did in the court below, endeavor to make this the very simple case of the entrusting to the defendants of certain personal property by him, which personal property they feloniously and surreptitiously disposed of without any account to him. From the arguments which he and his counsel have heretofore made in the case, one at the very least would suppose it to be such a case as that of *Parson* v. *Martin*, 11 Gray (77 Mass.), 111, where a certain specific certificate of stock had been placed by the plaintiff in the hands of the defendant and that certificate converted. In truth and in fact the case is a very different one, and it seems advisable with reference to the whole discussion of the legal points and of the facts involved in this case, to consider briefly the true character of the stock-brokerage business as it was carried on by the defendants and joined in by the plaintiff. Chicago, as this court will take judicial cognizance, is not a great financial center, nor does the stock-brokerage business, so-called, or Stock Exchange, flourish there to any great extent; but the similarity of the methods employed to those in use upon the purely speculative side of the Produce Exchange makes to the local bar and to the courts the procedure fairly familiar. The evidence in this case shows that Crawford & Valentine were continually "trading" in very large amounts for various customers, and for themselves, by private wire upon the Stock Exchanges of New York and of Philadelphia, and that they were "trading" over the same wire for their cor-

respondent brokerage firms in New York and Philadelphia in immense sums upon what are termed Chicago securities, and even upon the Produce Exchange. All this business was done exclusively by the eastern brokers in the name and for the account of Crawford & Valentine, no disclosure of any principals being made by Crawford & Valentine nor any differences being made or signified to the eastern brokers between orders which were the result of instructions given Crawford & Valentine by so-called clients or customers, and those speculative deals, of which there appear to have been many, carried under what is called the "stocks and bonds" account or "house account" of Crawford & Valentine themselves.

Stock brokerage is really carried on in New York and Philadelphia, hardly so in Chicago at all; the Chicago end of the business, so far as eastern stocks are concerned, bearing about the same relation to the eastern Stock Exchanges as the bucket-shops scattered through the west in various country towns do to the Chicago Board of Trade. So far as the eastern end and more particularly the Philadelphia end of these transactions of Crawford & Valentine was concerned, it appears that even there, no particular stock was in the hands of the brokers in Philadelphia particularly applicable to the trades of Crawford & Valentine, or marked as belonging to them or was capable of identification as held for their account. The testimony of Mr. Drayton and Mr. Dick upon cross examination is clear and specific upon these points. Thus Mr. Drayton says that the fact was that Toland Bros. always held themselves ready to deliver upon the payment of the money which they had upon their books charged to Crawford & Valentine the amount of the stock which they had credited to the account of Crawford & Valentine, but that there was no particular stock which was marked

to Crawford & Valentine. (Abst., 99, 100.) He also testified that they have a clearing house for stock transactions in connection with the Philadelphia Stock Exchange and that whenever the amount of any given stock purchased upon any one day from the brokers upon the Philadelphia Stock Exchange equaled the amount that they had sold, then by virtue of this clearing house arrangement, no stock might pass. (Abst., 99, 100.) This arrangement is the same all over the world, Mr. Drayton says, and we suppose this is true. What these Philadelphia brokers did for Crawford & Valentine generally was not to buy and hold any specific shares of stock and carry them as pledges or bankers or collateral lenders or anything of that sort. All that theory is purely legal fiction, which we will hereafter briefly discuss in the light of the New York decisions upon which the plaintiff entirely relies. What the Philadelphia brokers did do for Crawford & Valentine was to enter into a contract with them to transfer to them certain stock upon the payment of a certain amount of money, being the market price upon the day the order was given, together with commissions and interest, it being, however, the clear understanding and idea of the parties that the stock would never be called for by Crawford & Valentine, but that at some subsequent time a settlement would be made in accordance with the market of the latter date. This was just as much the understanding in the case of purchase made by Crawford & Valentine as it was when they "sold short" in Philadelphia, which they frequently did, arriving at a settlement by "buying in" through the same broker, a condition of things in which it is apparent that there could be no particular stock which ever became the property of Crawford & Valentine. As Judge Woodruff in his dissenting opinion in *Markham* v. *Jourdain*, before cited, says of a similar transaction:

> "The transaction is an executory agreement for a pure speculation in the rise and fall of stock, which the broker, on condition of perfect indemnity against loss, agrees to carry through in his own name and on his own means of credit, accounting to his customer for the profits, if any, and holding him responsible for the losses."

Or, as that great intellectual giant of the law, Chief Justice Shaw of Massachusetts, says:

> "The contract is strictly conditional to deliver so many shares on payment of so much money; the money was never paid and the title to have performance never accrued."

Or as Judge Lowell, in the United States District Court for Massachusetts, has said very recently:

> "There is no obligation resting on the broker to buy the shares in the first instance, or even to refrain from disposing of them during the existence of the contract, so long as he delivers them when the customer tenders the money and demands the performance."

As a part of these transactions, whatever they were, Crawford & Valentine agreed, as the testimony showed, not only to pay interest upon the market value of the stock at the time it was bought, and commission, but also, in order to protect the Philadelphia people from any possible loss, to keep on deposit 10 per cent or so of the par value of the stock, so that, except in cases of unusual and unexpected fluctuations in value, the brokers in Philadelphia would be protected against loss and be positively sure of securing the compensation for which they took the risk.

It does not even appear that these Philadelphia brokers always, when making these contracts with Crawford & Valentine or other western correspondents, themselves bought

or sold the stock in question, although undoubtedly it is the usual custom of the trade to do so. Thus it appears affirmatively from Mr. Dick's testimony, emphatically repeated in the face of Mr. Burke's attempting to make him retract it (Abst., 148, and see page 142), that in certain contingencies the Philadelphia brokers, would make no trade at all, but make only a book entry. Thus, if he received an order to buy and sell the same stock for the same broker, Mr. Dick says, he would do what in Stock Exchange relations is called "cross the order." "I would go upon the "Stock Exchange and record the transaction. I would then "return to my office and report to the broker, 'I have bought "and sold for your account 100 shares of ..... stock "at ..... price.' I would place the purchase on one "side of my purchase and sales book, and the sale on the "other side. I would charge his account with the purchase, "plus the commission, and credit his account with the sale, "less the commission. In that case no stock would come to "him or be delivered by me." (Abst., 148.)

Again:

> "Q. Did I understand you to say that you do not always buy or sell as the case may be, upon the order of the broker? A. It depends upon the nature of my instructions.
>
> "Q. Where you have two orders, one to buy and one to sell? A. Suppose I have an order to buy 100 Metropolitan at 107 and it is selling at 108. I do not always execute the order. It depends upon the nature of my instructions. If I had an order to buy stock at best I would then execute it as instantaneously as I could. If, before I executed that order, I received an order to sell 100 at best, I would trade that myself naturally. There is the whole thing." (Abst., 149.)

Thus far we have been considering merely the transaction between Crawford & Valentine and the Philadelphia brokers,

and even with relation to them, we do not believe that the courts should or would say that the Philadelphia brokers were "pledgees" of stock which Crawford & Valentine had "entrusted" to them, so that an action of trover or conversion would lie in favor of Crawford & Valentine upon the unauthorized sale by the Philadelphia brokers of such stock.

In one sense the question of what the liability of the Philadelphia brokers might be to Crawford & Valentine for an unauthorized sale is a purely academic one in view of the considerations which affect the relations between the plaintiff below and the defendants; but if the court should hold that the relations of the Philadelphia brokers to Crawford & Valentine were not trust relations, that Dick Bros. and Toland Bros. & Co. were not "pledgees" of Crawford & Valentine's stock, there is an end to the case. For, *a fortiori,* if such a relation did not exist between Crawford & Valentine and the Philadelphia brokers as would entitle the former in similar circumstances to maintain this action against the latter, or as would prevent indebtedness arising from such transaction from the Philadelphia brokers to Crawford & Valentine being subject to a discharge in bankruptcy, then no such relation could exist in favor of the plaintiff below as against Crawford & Valentine.

The theory which would give under similar circumstances to Crawford & Valentine as against the Philadelphia brokers such an action as the plaintiff claims has accrued to him against Crawford & Valentine, and the theory upon which alone the plaintiff predicates fraud in the transactions under consideration, rests absolutely upon a line of New York cases which give countenance to a purely legal fiction, which the majority of the court adopted in *Markham* v. *Jourdain,* 41 N. Y., 39. It is needless to discuss any of the other cases

than that of *Markham* v. *Jourdain*, for upon the doctrine of pledge between the customer and the stockbroker, as enunciated by Judge Hunt in that case, all subsequent cases involving the question turned. But the opinion of the majority of the court in *Markham* v. *Jourdain* also held to the theory of a measure of damages, and to a proposition concerning the admission of evidence of the customs and usages of the Stock Exchange since entirely discredited and overruled, even in New York. (See, *Baker* v. *Drake*, 53 New York, 211; *Baker* v. *Drake*, 66 New York, 518.) It is to be noted that in the points in which it is discredited and overruled the opinions of the dissenting judges in *Markham* v. *Jourdain* are not more strenuous than upon the main point. We hold firmly to the belief that in the opinion of Judges Grover and Woodruff, dissenting from the opinion of the court in *Markham* v. *Jourdain*, will be found by this court the true principles of law, which would govern this case, were the defendants themselves the persons expected to buy and carry the stock. Dissenting opinions in the New York Court of Appeals are just as binding upon an Illinois court as the opinion of the majority of the same court, and no more so. Opinions from foreign courts are not, in the true sense of the word, "authority" upon an Illinois court, or upon this court. They owe their force to the strength with which they appeal to the reason and conscience of the judge, and we are content to apply this test in the question whether the opinion of Judge Hunt or the opinions of Judges Grover and Woodruff should be adopted. If the latter opinions are adopted, that, independently of all other considerations, would make an end to this case.

The opinion of the majority of the court in *Markham* v. *Jourdain* has been followed elsewhere. Explicitly, for ex-

ample, it has been followed by the Supreme Court of that mining camp, known as the State of Nevada.

Boylan v. *Huguet,* 8 Nevada, 345.

But it has been rejected by such judges as Allen and Rapallo in New York itself, notwithstanding the authority which it necessarily had in that state. (See dissent in *Baker* v. *Drake,* 66 N. Y., 518.) It is entirely denied by the Supreme Court of Massachusetts by Chief Justice Shaw in *Wood* v. *Hayes,* 15 Gray, 375, where he says of such an arrangement between the broker and the client that it stands "entirely upon the footing of the contract." And in *Coville* v. *Loud,* 135 Mass., 41, the doctrine is explicitly and in terms and with force repudiated. In *Weston* v. *Jordan,* 168 Mass., 501, the Supreme Court of Massachusetts again declares that:

> "When a broker buys shares at a margin and carries them for a customer, it has been held in some states that the relation between the customer and the broker is that of pledgor and pledgee. This view has not been accepted in Massachusetts."

Judge Lowell in the United States District Court of Massachusetts in *re Swift,* 105 Fed. Rep., 493, rendered an opinion in bankruptcy, in which, reviewing the cases, he delivered an opinion, the syllabus of which is as follows:

> "Under the law of Massachusetts as established by the decision, a broker who has purchased stock on a margin for a customer is not a pledgee thereof to secure his advances, but his contract is conditional, to deliver so many shares of the stock on payment of the remainder of the purchase price, and he may pledge the stock for his own debt, or even sell it without being guilty of conversion or of a breach of the contract until a demand has been made by the customer and refused."

In his opinion he says:

> "To hold that a broker is pledgee of stock bought by him on a margin would revolutionize the theory and practice of stockbrokers in Massachusetts."

(*Note.*—Notwithstanding the intimations of the plaintiff that *Markham* v. *Jourdain* governs the law in Illinois, we assert that "the theory and practice of stockbrokers" in Illinois is equally at variance with the legal fiction on which that case rests.)

> "If a stockbroker is the pledgee of this stock, then in the absence of authority from the pledgor, he can not rightfully transfer the stock to another by way of sale or by way of collateral security for an amount greater than that due him. * * * Yet, it is a matter of common knowledge that honest brokers in Massasetts pledge stock bought and carried by them on a margin for their customers as a security for their own debts, regardless of the amount of the customer's debt to them. To hold that in doing so they convert the stock. * * * is a conclusion to be avoided if possible. Again, the persons to whom the stock is pledged by the broker are understood to hold it until the broker's debt to them is discharged, irrespective of the state of accounts between the broker and the customer. This is true, though the pledgee knows that the stock was bought on a margin."

And again:

> "It was urged in the argument before me that the opinion in *Weston* v. *Jourdain* requires the broker always to have on hand shares enough to meet the customer's order, but this is not the true interpretation of the opinion. * * * Indeed, the Massachusetts doctrine plainly implies the contrary. Can it be said that the broker has on hand or under his control, stock which is pledged to a third party for a sum greater

than the debt of the customer to him? I think not. Yet both cases and daily practice support the broker's right to repledge in this way, and custom, at least, supports the right of the broker's pledgee to hold the stock against the customer. * * * There is no obligation resting on the broker to buy shares in the first instance, or even to refrain from disposing of them during the existence of the contract, so long as he delivers them when the customer tenders the money and demands performance."

Judge Lowell then takes up the apparent recognition of obligation upon the broker by the custom of brokers "to do something" before the stock is finally demanded. But he says that the courts of Massachusetts have treated this obligation as "compatible, not only with the broker's right to pledge the stock for his general debts, but, also, with the right of absolute sale"; and he argues that this vague impression of obligation on the part of brokers can not avail against logic and common sense, which under the relations by law existing between them, do not require the broker to retain any "shadowy right" in the stock any more than they prevent him from pledging it for his own debts.

Markham v. *Jourdain* is already discredited in Illinois. It has been said by the Supreme Court of this state in *Corbett* v. *Underwood*, 83 Ill., 324, that *Markham* v. *Jourdain* can not govern a case where, instead of the property being actually delivered into the actual possession of the defendant, it never came into his possession, which, as will be more fully dwelt upon hereafter, is certainly the case at bar, and the Supreme Court of Illinois declares that the usages and customs of the exchange upon which the contracts are to be executed are competent in evidence; this being a decision in the teeth of the opinion in the majority of the court in *Markham* v. *Jourdain*.

We doubt, indeed, whether an action of trover or conversion can lie for shares of stock in an incorporated company as belonging to the plaintiff in any case, where, as in this case, no particular certificate of stock in the hands of the broker could have been identified as the customer's property. This is independent of all questions concerning the defendants holding such stock, or the ownership of any such stock. Even if he had the ownership of the stock, if there were no particular certificates which identified it, it is not the proper subject of an action of trover. *Howell v. Lancaster*, 17 Sargent & Rawle, well expresses the rule. The court says:

> "Though trover might lie for a certificate of stock, as it does for a bond or debt, yet it will not lie for 100 shares of the stock, any more than it would for a debt due or for a right of entry."

It is, however, when we turn from the relations of Crawford & Valentine with their Philadelphia correspondents altogether, and look at the real state of affairs and the nature of such business at this end (in Chicago) as the plaintiff was engaged in with the defendants, that we can see most clearly the absolute *grotesqueness* of the proposition which Mr. Burke asserts in his pleadings and assumes in his arguments, *i. e.*, that he had "entrusted" to the defendants as "pledgees" stock which they "converted." At the very best, as we have pointed out, the doctrine as between any customer and any broker is a legal fiction, which it required a labored and sophistical argument of sophistical judges to incorporate into the jurisprudence of New York. But no such doctrine ever existed as between a customer and an intermediate "forwarder" or "middleman." As we have heretofore shown, the Supreme Court of Illinois have ex-

pressly said in *Corbett* v. *Underwood* that the doctrine of *Markham* v. *Jourdain* could certainly not govern cases where, instead of the property being actually delivered into the actual possession of the defendant it never came into his possession. Did Crawford & Valentine ever receive any of this Metropolitan Traction stock? Did it ever come into their possession? Did they ever intend or expect that it would, any more than did the Sugar stock and the Reading stock, and the People's Traction stock and the Gas stock which Burke had been "speculating" in through them? The court can have no doubt that had Mr. Burke at any time come into the office of Crawford & Valentine with the actual value of 550 shares of Metropolitan Traction stock in his hands and asked for the certificates the whole office force would have been stricken with paralysis of the power of speech. It is absurd. The plaintiff below did not instruct or order the defendants Crawford & Valentine to "purchase" stock for him or "to receive" stock for him or "to take over" stock for him. (For he tries to make a distinction which does not in reality exist between the *"taking up" of the contracts* of Valentine & McAvoy and Jamieson & Co. and the *"purchase" of stock.*) As we said in our "Statement," the very utmost that can be claimed by him is that he instructed the defendants to instruct Philadelphia brokers to "purchase" or "receive" or "take over" stock to be paid for by said Philadelphia brokers, until he should again instruct said defendants to order said Philadelphia brokers to resell the same. It might be claimed, also, that the contract included according to the customs and usages of the stock exchanges in Chicago and Philadelphia (of which Mr. Burke was perfectly cognizant) a guaranty on the part of the defendants to the plaintiff, that so far as he was concerned they would protect the contract so made by the Philadelphia

brokers. But there certainly was never any "trusteeship" on the part of the defendants thus created, nor did there come, nor was there expected to come, nor could there ever have come under the arrangement, any property whatever into the hands of the defendants belonging to the plaintiff and for which an action of conversion could lie.

But even the claim of the plaintiff below thus modified could not be sustained. Let us look at the situation a little closer, remembering all the time that John E. Burke was no ignoramus or innocent in these transactions. The evidence conclusively shows that he had been for years "playing" the stock exchange, or "speculating" if he prefers that term, without any intention of receiving or delivering any actual stock. Had he been seeking legitimate "investments," speculative or otherwise, in stocks, it is evident that he would have dealt directly with the real stockbrokers in New York or Philadelphia who handled these stocks, and not "traded" through the intermediary of what, as far as those stocks were concerned, could be nothing more or less than a bucket-shop. He was risking continually through these different stock-jobbing establishments in Chicago his money in purchases and sales upon margins of stocks in which he had no possible interest except as a speculator, which could only be bought or sold in a distant state through foreign brokers by wire, and to pay for which would be at all times evidently beyond his possible resources. For the purpose of making gains upon the fluctuations of such stock he was an habitué and haunter of these brokers' offices, as the evidence shows, every day eagerly inspecting the "tape and ticker." And what did this knowledge which he thus obtained of the usages and customs of the business inform him of? Plainly that when he, or any other customers of Crawford & Valentine, ordered, in their parlance, Craw-

ford & Valentine "to buy or sell stock," no share or certificate of which was hardly ever seen in Chicago, Crawford & Valentine would do nothing of the sort. Whatever language such order was couched in, Mr. Burke knew this perfectly well. He knew, indeed, that by telegraphic communication Crawford & Valentine might instruct somebody in New York or Philadelphia to buy that stock for the account of Crawford & Valentine; but even that was not the essential feature of Mr. Burke's contract with Crawford & Valentine, nor in our opinion one which he regarded as of importance. He deemed Crawford & Valentine to be solvent and ready and willing if he complied with his obligations in the game, to fulfil theirs. He was to keep 10 per cent of the par value of the stock in their hands to guarantee his end of the contract; and they undertook if the fluctuation of the stock was in his favor, at any time that he demanded it, to promptly pay him his winnings. If they insured themselves in this sort of a transaction by buying or selling in Philadelphia, well and good, and it may, indeed, be presumed that from his knowledge of the ordinary course of the business, Mr. Burke thought and believed that they would and did do so. But he could not have especially relied upon the idea that there was any security beyond the solvency of Crawford & Valentine and their willingness to respond to their contracts, arising from these Philadelphia transactions; for his knowledge of the course of the business would have shown him that no such security *could* exist. Thus, suppose after Mr. Burke's contract with Crawford & Valentine in consequence of which Crawford & Valentine undertook to "carry" 500 shares of Metropolitan Traction stock for him, and had contracted with Dick Bros. & Co. that such an amount should be "carried" for them, Mr. Pullman or some other customer of Crawford & Valen-

tine gave orders to Crawford & Valentine to "sell" for his account 500 shares of Metropolitan Traction. Mr. Burke is not of those who, like the innocent in the play, suppose that brokers can not sell what they have not bought. Mr. Burke knew perfectly well that any one out of hundreds, it may be, of Crawford & Valentine's customers might desire to sell Metropolitan Traction short. He knew that in the ordinary course of business in such a case Crawford & Valentine would order their correspondents, Dick Bros. & Co., to sell for *their* account 500 shares of Metropolitan Traction. What does Mr. Burke suppose would have been the result of this transaction, which no person could claim was irregular or out of the ordinary course of business upon his so-called "holdings?" The result in Philadelphia is shown in such a case by what did happen when Crawford & Valentine, first for Joseph R. Wilkins, and then on their own acount, went, as they called it, "short" in this Metropolitan stock. Dick Bros. & Co., having bought the stock and *credited* it to Crawford & Valentine's account because of the order given by Crawford & Valentine when Burke instructed them, and having sold the same amount of the same stock upon the order of Crawford & Valentine and debited their account with it, when Pullman or such other customer had given Crawford & Valentine instructions, would have had no Metropolitan Traction stock for Crawford & Valentine. But both Burke and Pullman would have had contracts with Crawford & Valentine, and those only. We say that Mr. Burke, the testimony shows, knew perfectly well the character of the business and the usages and customs of the trade which would have brought about this result, and could not have relied upon the trading which Crawford & Valentine did through their correspondents in Philadelphia and which did not amount to giving him any

security whatever in his dealings with these brokers. The stock-brokerage business must be dangerous and hazardous enough even in the great financial centers where it is most legitimately carried on, and where actual certificates of stock to the amount of millions upon millions of dollars pass from hand to hand every day. How much more so in the case of persons like the defendants, who, a thousand miles away from the seat of operations, are dealing for their customers here, necessarily through entirely independent and third parties, "carrying" for such customers upon "margins" the stocks dealt in, only by getting somebody else a thousand miles away to "carry" the same stock for them, on a similar margin?

The truth about this alleged conversion is that, without deeming it irregular and without anticipating, of course, the crash which came, Crawford & Valentine, after having ordered stock bought for their account in Philadelphia because of the transaction between Burke and themselves, first, upon the order of Wilkins, sold short 100 shares of Metropolitan Traction, and then bought it in, and afterwards deemed it would be a profitable speculation to trade upon the short side of the market in the same stock through the same brokers. It was not in their mind Mr. Burke's stock that they were selling, for in their mind Mr. Burke had no stock; he had simply a contract with them which they held themselves ready to perform, to settle such difference as should exist in his favor between the market price at the time that he ordered the stock bought and the time that he ordered it sold. They were doing on their own account, however, what they would have been obliged to do, and what it would have been perfectly regular for them to have done for another customer.

We can not, indeed, see how if there had never been a

single sale of Metropolitan Traction stock made for Crawford & Valentine in Philadelphia Mr. Burke would have had, upon their failure, any advantage over his present situation. Consider: Crawford & Valentine were dealing with Dick Bros. & Co. very extensively in all sorts and kinds of securities; a running account was kept between the two firms. Suppose that at the time of the failure Metropolitan Traction did stand to the credit of Crawford & Valentine with a considerable profit in it over the amount at which it had been bought. Suppose that upon the other side of Dick Bros. & Co.'s account with Crawford & Valentine there had been deals in Gas and Reading and Sugar and a score of other stocks, and that the losses upon those stocks were much greater than the profit upon the Metropolitan Traction leaving Crawford & Valentine upon the whole account very much in debt at the time of their failure to Dick Bros. & Co.; does Mr. Burke imagine that he could ever have received the benefit of the profit in the Metropolitan Traction stock by tendering to Dick Bros. & Co. the amount which they had expended upon that stock alone, with interest and commissions, no note being taken of the other and unprofitable deals of Crawford & Valentine with Dick Bros. & Co. standing upon the same account? If he does, he reckons without his host; for Dick Bros. & Co. did not have disclosed to them the persons upon whose account Crawford & Valentine were trading, and they knew in the transactions and were bound to know from first to last only Crawford & Valentine. This was the custom and rule of the business, and this custom and rule of the business Mr. Burke knew. If it be true that it was entirely dependent upon the state of the account between Crawford & Valentine and Dick Bros. & Co., how much the latter could demand before giving up any Metropolitan Traction stock that they might have

had, does it not follow that there is a legal impossibility in treating the Metropolitan Traction stock in the hands of Dick Bros. & Co. as the property of Burke and allowing him to recover upon such a theory.

Another incident in the dealings between the defendants we desire to call attention to, as throwing light upon the intention of Mr. Burke as to ever receiving this stock. When he took Mr. Kent to Crawford & Valentine, Mr. Kent, in his presence, so the evidence is, said that he would put up what would be sufficient to make a ten point margin on the Metropolitan Traction stock, but that was the last margin that he would ever put up for Mr. Burke (Abst., 196); that when that was gone he was through and the stock account could be wiped out and that if he put it up he wanted it understood that he would receive that amount back again whenever there was a ten point margin still left. Does that look like helping Mr. Burke in a legitimate investment speculative or otherwise in Metropolitan Traction stock, or does it look like helping Mr. Burke to "buy or sell on margins shares of stock without intending actually to receive the same if purchased or to deliver the same if sold?" (The quotation is from the Bucket-Shop Act of the State of Illinois.)

As we have before remarked, we can see nothing in the pretended distinction which the defendant in error makes between the transactions which actually occurred and that what they would have been had Crawford & Valentine been instructed originally that Burke wanted them to order "bought" five hundred Metropolitan Traction, instead of being instructed that he wanted them to "take over a deal" of Valentine & McAvoy's with him, and had been instructed to purchase three hundred Metropolitan Traction in January instead of being instructed to "take over" a precisely

similar deal in which Jamieson & Co. had been so instructed; for the evidence clearly shows that from the actual facts and from the necessary course of business, the stock which Valentine & McAvoy had ordered Dick Bros. & Co. to buy, and which Jamieson & Co. had ordered Huhn & Glendenning to buy, never passed into the ownership or possession of the plaintiff, and never was any more his property for which he could maintain such an action as this, than it would have been had Crawford & Valentine ordered it bought in the first instance.

Independently of the consideration of the invalidity of the contracts, we have already sufficiently discussed and insisted upon the proposition that as they were purely contractual relations and not those of trusteeship or bailment, the counts of this declaration for conversion, on which the judgment was rendered, can not be maintained. It seems to us inconceivable that under the evidence adduced here, it can be held that to a single share of Metropolitan Traction stock, which ever was held or alleged to have been held by Dick Bros. & Co. or by Toland Bros. & Co. in Philadelphia, Mr. Burke had either the right of property or the right of possession. If he had not, he must fail in his action for conversion.

As to the counts for deceit (the last five in plaintiff's declaration) they could not, in our view of the case, be material in any event, but the court below has implicitly said that we are not liable upon them. The judgment was given upon the other five. We refer to our "Statement," pages 36 and 37, of this brief and argument for our view concerning the materiality and the good faith of these representations.

V.

The irresistible inference from the testimony is to the effect that all the stock transactions in which the parties were from first to last engaged were of a gambling and illegal character.

1. During the entire space of time covered by these transactions the defendant in error never had possession of, nor did he ever see, any of the stock in which he pretended to be dealing and which stood to his apparent credit on the books of the plaintiffs in error, nor did he have control over any of such stock.

2. The same is true of his transactions through Valentine & McAvoy, the predecessors of Crawford & Valentine.

3. While the apparent volume of his transactions in stocks of various kinds through Crawford & Valentine and their predecessors amounted to hundreds of thousands of dollars, Mr. Burke never paid a dollar on the purchase price of his pretended investments. Except as they became so incidentally, his payments to margin his deals were not payments on the price of the stock, but to indemnify his brokers against a falling market.

4. There was no talk or understanding between the parties to the effect that Burke would ever pay for and actually receive the stock in question, nor was there any expectation on the part of anyone that he would.

5. Nor was there any expectation on the part of Crawford & Valentine that they would ever be called upon to deliver to Mr. Burke any of the stock which he was pretending to deal in.

6. On the contrary, it was the understanding, all around, tacit, if not expressed, that the sole object of all these transactions was the margin or market difference, and the markets were carefully watched from day to day to that end.

In other words, defendant in error was speculating in market differences, and not in stock.

7. During the entire time of Burke's transactions with both firms he never demanded the stock in question, nor any other stock which he pretended to own through his dealings with either of these firms, until after the failure of the plaintiffs in error, when he first conceived the idea of making a demand, and instituting this form of action.

8. No demand was ever made on Burke to pay his indebtedness for the stock in question, or any other stock dealt in by him.

9. Burke was never in a condition, at any time during the course of the transactions, to pay the plaintiffs in error even a small fraction of his pretended indebtedness to them.

10. When the last margin of $3,800 was put up, Burke was unable to advance more than $500. At that time he owed an apparent indebtedness to Crawford & Valentine of about $60,000.

11. Neither Crawford & Valentine nor their predecessor firm had at any time in their possession, or under their absolute control, any of the stock dealt in by the defendant in error.

12. All pretended purchases of stock were made by the plaintiffs in error through eastern brokers in their own name. Burke was unknown in the purchase by the eastern brokers, and the stock in their hands was always to the credit of Crawford & Valentine and was thus held as collateral to a pretended indebtedness of Crawford & Valentine to such eastern brokers.

13. Had the stock, or any of it, declined in the market below the margin paid, it would have been sold out at once by the eastern brokers, and the account debited or credited

with the gain or loss, as the case might be, and similar entries made in the accounts between the parties to this action.

> "All contracts for the purchase or sale of property with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the contract and market prices, are mere wager or gambling contracts and void."
>
> *Schneider* v. *Turner,* 130 Ill., 39.

See, also,

Cothran v. *Ellis,* 125 Ill., 506.
Lyon v. *Culbertson,* 83 Ill., 38.
Goby v. *People,* 31 Ill. App., 242.

Such a contract is void at common law and the statutes of Illinois making void "option" contracts and sales for "future delivery" leaves the common law in force.

Schneider v. *Turner,* 130 Ill., 39.
Cothran v. *Ellis,* 125 Ill., 506.
Lyon v. *Culbertson,* 83 Ill., 38.
Soby v. *People,* 31 Ill. App., 242.
Jamieson v. *Wallace,* 167 Ill., 396.

Viewing this matter as a whole, it is impossible to avoid the conclusion that this whole transaction is contrary to the policy of the law of the State of Illinois, and that from it no action (not even assumpsit) can arise in favor of the defendant in error. If an action in assumpsit for the breach of the contract which was entered into between the plaintiffs in error and defendant in error can not be sustained, neither can this action in tort. This proposition we suppose hardly requires authority, but incidentally we will say that

the case of *Coville* v. *Loud,* 135 Mass., 41, which we have heretofore cited as denying the "pledgor and pledgee" doctrine as between customers and brokers, was an action of tort. The circumstances were much more favorable to sustaining the action than in the case at bar, but the court, upon the ground that it was purely a matter of contract, said the case could not be sustained, and in conclusion remarked:

> "We have not deemed it necessary to consider whether a contract like this of buying stocks on a margin is to be deemed so contrary to the policy of the law that neither party can maintain any action against the other for breach of it."

Such a statement, however, would show that in the opinion of the Supreme Court of Massachusetts, transactions which would not support an action of assumpsit upon a contract between the client and the broker, will not sustain an action in tort like the present. Such is undoubtedly the law.

The Supreme Court of Massachusetts was speaking of the common law, and the question which they considered it unnecessary to consider, was whether a contract for "buying stocks on a margin" was to be deemed contrary to the policy of the common law. But the policy of the law in Illinois is very pronounced in relation to such transactions, as we respectfully submit. The test in such a case as the present is not what the form of the alleged contract be, but whether there is an intention and expectation upon the part of the persons engaged in the business that the property originally bought upon margin is ever to be actually delivered to the original customer or principal, or whether the deal is, so far as he is concerned, to be settled on "differences." If the latter is the fact, it does not matter what the form of the contract between the brokers and the vendor may be, nor whether

or not the brokers may be compelled under the rules of the exchange in which he may be trading himself, to receive the property. See *Tenney* v. *Foote*, 4 Bradwell, 594, where the opinion of Judge McAllister in the Circuit Court is adopted and given, the said opinion being afterwards endorsed by the Supreme Court in *Tenney* v. *Foote*, 95 Ill., 34.

See, also, *Schneider* v. *Turner*, 130 Ill., 28, where Judge McAllister traces the origin of the gambling transactions in "futures" upon the Board of Trade to similar gambling transactions upon Stock Exchanges. See, also, *Pope* v. *Hauke*, 155 Ill., 617, and many others. It is not the element of future delivery which has made the courts hold these various grain transactions upon the Board of Trade void as gaming contracts, but the fact that as between client and broker there was never any intention or expectation upon the part of the former to receive or deliver grain. Now, we think that the evidence in this case abundantly sustains the proposition that Burke never had the intention of taking this stock, or of offering to the brokers either here or in Philadelphia the value of it. It was purely a case of buying and selling stocks upon so-called margins. We submit further that the so-called "bucket-shop act" passed upon the 9th of June, 1887, and entitled "An Act to Suppress Bucket-Shops and Gambling in Stocks, Bonds, Petroleum, Cotton, Grain, Provisions or other Produce," while it does not change the common law so far as the validity of these gambling contracts is concerned, definitely expresses the policy of the State of Illinois regarding them and that it is plainly to be seen in that act that the buying or selling stocks upon so-called margins is the evil aimed at. To that act as it is found upon page 1304 of the last edition of Starr & Curtis' Statutes, and especially also to the case of *Saltz* v. *The People*, decided in the Third District by Judge Conger,

81 Ill. App., 162, we call the attention of the court. Soby was indicted for keeping in Jacksonville just such a place with regard to grain and provisions dealt in upon the Chicago Board of Trade, as the defendants kept in Chicago with regard to stocks dealt in in New York and Philadelphia. He kept an office and showed the quotations of the various markets, particularly of Chicago, on these commodities. He took orders from customers for these commodities and sent them to Lindblom & Co., his correspondents in Chicago, who executed them, as he swore, upon the Board of Trade. His customers put up a margin with him and he put up a margin with Lindblom. He never asked the intention of his customers, but his customers have had grain delivered to them. His customers, or one of them, swore that he did not buy the grain for actual use, but to make money out of it. The court says:

"An analysis of the first section will show that there are three different ways in which the same offense is described: First, keeping any place wherein is conducted or permitted the pretended buying or selling of grain, etc., either on margins or otherwise without any intention of receiving and paying for the property so bought or of delivering it sold; second, keeping a place wherein is conducted or permitted the pretended buying or selling of such property on margins; and third, where the party buying any of such property or offering to buy the same, does not intend actually to receive the same if purchased or to deliver the same if sold. The pretended buying or selling of margins is a term in popular use and its meaning well understood, and would doubtless have been sufficient description of what was intended to be prohibited, except for the ease with which it could be evaded; hence, the legislature have also given the first and third descriptions, so that while those engaged in the transaction may give it such a name as they choose, if it can be

seen the real intent of the parties was merely to speculate upon the rise or fall of prices and no actual delivery was contemplated, but the parties expected to settle upon the differences in the market, then it would be a gambling contract."

The case of *Jamieson* v. *Wallace,* 167 Ill., 396, is especially applicable to the case at bar, as the facts in the two cases are much the same. In that case the dealings of the parties were held to be gambling transactions and void.

In reply defendant in error may say that this question is not an issue here. Judged by the pleadings, that may be so. It is not, however, a question of pleading that confronts the court, but a question of public policy. Transactions of this character are not declared illegal and void to advantage either party to an action, but to satisfy the demands of public policy. Whenever it appears to the court, no matter how, that the transaction involved in a litigation is immoral, illegal and void, the proceedings will be dismissed and the parties will be left where the court finds them, regardless of the pleadings.

In *Oscanyan* v. *Winchester, etc., Co.,* 103 U. S., 261, the opening statements of plaintiff's attorney clearly showed that the transaction upon which the action was based was illegal and void. The court dismissed the action at once. The pleadings were silent on that issue. The Supreme Court sustained the lower court and said:

> "It would not be restrained by defects of pleading, nor indeed could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. * * * In such cases there can be no waiver. The defense is allowed not for the sake of the defendant, but for the law itself. * * * Whenever the illegality appears, whether the evidence arises from the one side or the other, the disclosure is fatal to the cause."

It is quite within the power of this court if it see fit to decline to uphold a claim founded on transactions that are contrary to public policy, or against public morality. We suggest this respectfully, in the full belief that the evidence upon which the judgment rendered below and based would warrant such drastic action, irrespective of time or place, or state of pleadings.

Respectfully submitted.

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Attorneys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 247.

RICHARD CRAWFORD AND EDWARD A. VALENTINE, PLAINTIFFS IN ERROR,

vs.

JOHN E. BURKE, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a suit in tort brought by the defendant in error against the plaintiffs in error to recover damages sustained by him by reason of the positive frauds committed by them, and by reason of their willful and malicious injuries to his reversionary interests in certain shares of Metropolitan Traction stock, as alleged in the declaration.

In each of the first five counts of the declaration it is alleged that the defendants, under the firm name of Crawford & Valentine, were stock brokers and dealers in investment securities; that the plaintiff employed the defendants,

as his brokers and agents, to buy, hold, and carry stocks for him, subject to his order; that the defendants, as his brokers and agents, had in their possession or under their control and belonging to him a certain specified number of shares of the capital stock of the Metropolitan Traction Company, which they held as a pledge and as security for the amount due them from the plaintiff on said stock; that the defendants wrongfully, willfully, and fraudulently, and without his knowledge or consent, sold said shares of stock, and willfully and fraudulently, and *with intent to cheat and defraud* the plaintiff, converted said stock and the plaintiff's reversionary interests therein to their own use, by means whereof the plaintiff's reversionary interests in said stock were wholly lost to him.

In each of the last five counts of the declaration it is alleged that after the defendants had wrongfully and fraudulently, and without his knowledge or consent, sold the plaintiff's stock and had converted the proceeds of the sales to their own use, they falsely and fraudulently represented to him that they still had the stock on hand, and were still holding and carrying it for him; that their correspondents at Philadelphia, where the stock had been bought, were then and there calling upon them for further payments or margins on the stock, and that therefore it was necessary for them, the defendants, to call upon the plaintiff to make further payments on the stock in order that they might comply with the demands of their correspondents, and be secured against loss. It is alleged in each of said counts that the aforesaid representations were false and fraudulent, and that, by means of said false and fraudulent representations, the defendants obtained from the plaintiff several large sums of money, amounting in the aggregate to the sum of $10,800.

A suit, involving the transaction in controversy in this case, was brought in 1895, shortly after the failure of plaintiffs in error. The declaration was substantially the same

as the declaration in the present suit. The defendants filed pleas of "Not guilty." The cause came on for trial in 1897, and was tried by the court without a jury, a jury trial having been waived by both parties in open court. An abstract of the evidence, and briefs on each side, were submitted to the court, at its suggestion, and the case was taken under advisement. After counsel of both parties were notified that the court was ready to announce its decision, counsel for plaintiff requested the defendants' counsel, in open court, to file, *in writing*, their waiver of a jury in order that the plaintiff, in case the judgment should be in his favor, might have the benefit of the provisions of the statute with reference to the waiver of a jury. This, the defendants' counsel refused to do. Thereupon the plaintiff withdrew his suit, and on July 20, 1897, immediately after the withdrawal of the suit, commenced the present suit. The defendants pleaded "Not guilty." Issue was joined January 4, 1898 (Rec., 25). A jury was waived, in writing, May 12, 1900 (Rec., 28). The trial commenced on January 3, 1901, and after the opening statements had been made by counsel the defendants filed their separate pleas *puis darrein continuance*, setting up their discharge in bankruptcy as a defense, and also, in the same pleas, alleging that the plaintiff's claims were provable and were not excepted from the operation of their discharge. The plaintiff replied, denying that the claims in controversy were provable, and also denying that they were not excepted from the operation of the defendants' discharge (Rec., 32, 33).

Notwithstanding the plea of *puis darrein continuance*, the plaintiff introduced evidence and proved the allegations in his declaration, and the amount of damages which he had sustained.

The defendants were found "guilty" on each and all of the counts in the declaration, and judgment was entered against them (Rec., 34), as follows:

"This day again come the parties to this suit by their attorneys respectively and the court now here, after hearing all the evidence adduced, and being fully advised in the premises, finds the defendants Richard C. Crawford and Edward A. Valentine guilty, and assesses the plaintiff's damages to the sum of nine thousand and six hundred ninety dollars and twenty-one cents.

"Therefore it is considered by the court that the plaintiff do have and recover of and form the defendants Richard C. Crawford and Edward A. Valentine, his said damages of nine thousand six hundred ninety dollars and twenty-one cents ($9,690.21) in form as aforesaid by the court assessed together with his costs and charges in this behalf expended and have execution therefor.

"Thereupon the defendants having entered their exceptions herein pray an appeal from the judgment of this court to the appellate court in and for the first district of Illinois which is allowed upon said defendants filing herein their appeal bond in the penal sum of fifteen thousand dollars to be approved by the court together with their bill of exceptions within thirty days from this date."

In the appellate court, it appearing that one of the justices had taken part in the trial of the case below, and that the two remaining justices were unable to agree on the case, the judgment of the circuit court was affirmed (Rec., 254). The appellate court in its opinion filed in the case (201 Ill. App., 569) said:

"Many of the questions thus involved are important and not easy of decision."

The judgment of the appellate court was affirmed by the supreme court of Illinois on the appeal taken by the defendants (Rec., 261). The opinion of the supreme court will be found in the record at page 265.

ARGUMENT.

In a brief of 119 pages counsel for plaintiffs in error devote 25 pages to an argument on the Federal question now before this court, and which is the only question that the court can decide in the case at bar. The rest of their brief is given over to a rambling discussion of questions of fact, and to an argument on various legal questions, of which this court cannot take cognizance. Counsel call their discursive and vituperative harangue on a variety of questions of fact, an "argumentative statement." It cannot be that counsel have given so much time to a discussion of questions of fact simply for the purpose of giving expression to the malice and vindictiveness which their clients have shown since the commencement of these proceedings against them; and yet, it is somewhat difficult to see what other purpose it could serve, in view of counsel's admission that they do not urge a review of the facts "in expectation that this court will depart from its established procedure." Counsel's "argumentative statement" is substantially the same as that made in the courts below, and it is again repeated here. In the lower courts we thoroughly discussed all the questions of fact which were involved in the case. They are settled; and it would be a waste of time for us to discuss them in this court.

The main facts, on which the trial court found the defendants guilty, are set forth in the declaration. The facts so stated, and the facts which were hypothetically stated in the propositions of law submitted by plaintiff to the trial court, were proved at the trial, together with many evidentiary facts which tended to show the moral turpitude of the defendants. The affirmance of the judgment of the trial court by the appellate court settled the facts against the defendants.

The supreme court affirmed the judgment of the appellate court. In the opinion, the court said:

"The judgment of the appellate court is as conclusive upon all controverted questions of fact in this case as in any other, notwithstanding the recitals in the judgment of affirmance showing the disagreement between the two judges who considered the case in that court. The statute made no exception of such a case. We must regard all questions of fact as settled against appellants, and this includes all inferences of fact arising from facts actually proved (Rec., 269). * * * There was sufficient evidence for the court to find the facts as they were hypothetically stated in the plaintiff's propositions and also substantially as they were alleged in the declaration (Rec., 267). * * * The law undoubtedly is, and all the authorities so hold, that the fraud must be fraud in fact and not merely fraud implied by law. It must be positive fraud involving moral turpitude. It seems clear, however, that the declaration in this case sufficiently charges the *male fides* of the defendants in the transaction, setting forth their wrongful and fraudulent acts, and that such acts were done with intent to cheat and defraud the plaintiff; and there can be no doubt that the evidence is legally sufficient to support the declaration" (Rec., 269).

In each count of the declaration the defendants are charged with having committed a certain act, therein specified, with intent to cheat and defraud the plaintiff. An allegation of an intent to cheat and defraud is an allegation of fact. An allegation that an act was committed with intent to cheat and defraud is an averment of positive fraud involving moral turpitude. The trial court found that the allegations in the plaintiff's declaration were true.

The judgment of the court recites that "the court now here, after hearing all the evidence adduced, and being fully advised in the premises, finds the defendants Richard C. Crawford and Edward A. Valentine, guilty." The judgment of the court covered each and all the counts in the declaration. On each and every count the defendants were found guilty of having committed the act, therein specifically

set forth, with intent to cheat and defraud the plaintiff. The defendants were thereby adjudged to have committed positive fraud involving moral turpitude.

This court has repeatedly said that it could not review the facts on a writ of error to a State court. In Jenkins *vs.* Bull, 206 U. S., 280, Mr. Justice Brewer, delivering the opinion of the court, said:

"It is well settled that the findings of fact in the State courts are, on a writ of error conclusive with us (Hairston *v.* Atchison, &c., Railroad, 207 U. S., 673, 677, and cases cited therein; Bement *v.* National Harrow Co., *ante*, 70). In other words we apply the law to the facts settled in the State courts, and we do not search the record to see if there is not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion."

The trial court held certain propositions as law in the case (Rec., 236–245). The principles of law embodied in the propositions were applied by the court in rendering its judgment. The court found that the plaintiff's claims for damages were created by the defendants' fraud, involving moral turpitude, and held that they were excepted from the operation of defendants' discharge in bankruptcy. The affirmance of the judgment by the appellate court settled the facts, including the fact that the defendants had committed the several acts charged in the several counts in the declaration, *with intent to cheat and defraud the plaintiff.* That left for the courts of review the single question whether the law had been properly applied to the facts found. The supreme court of the State held that it had. That question is a Federal question, and it is now before this court for decision. The question is simply this:

Does a discharge in bankruptcy release a bankrupt from claims for unliquidated damages arising from or created by his positive fraud involving moral turpitude, while not acting as an officer, or as a trustee of an express trust, at the time he committed the fraud? That question involves an

opposing counsel admit, the construction of sections 17 and 63 of the bankruptcy act of 1898. The question as to the construction of section 63 comes first in order.

I.

The claims of defendant in error were claims for unliquidated damages arising out of torts; they were claims for damages occasioned by positive fraud; they were not provable in bankruptcy, and therefore were not barred by the discharge of plaintiffs in error.

For the purpose of comparison, we quote the provisions of the act of 1898 and the corresponding provisions of the act of 1867, relating to "Debts which may be proved."

Act of 1867.

Section 19 (Revised Statutes, section 5067): "That all debts due and payable by the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day. * * * may be proved against the estate of a bankrupt."

"All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest." * * *

"If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate."

Section 33 (Revised Statutes, 5117): "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary

character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

ACT OF 1898.

"SEC. 63. DEBTS WHICH MAY BE PROVED.—(*a*) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

"(*b*.) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

With reference to the proof of debts under the provisions of the act of 1898, we say:

1. That paragraph *a* of section 63 classifies all claims or "debts which may be proved," while paragraph *b* provides for the precedent liquidation of such unliquidated claims only as come within the provisions of paragraph *a*, and, thereafter, for the proof and allowance of such claims.

2. That claims for unliquidated damages arising out of torts do not come within any of the provisions of paragraph *a*, and hence are not provable.

At first there was some doubt as to the scope of paragraph *b*, as will be seen from the following quotation from the third edition of Collier on Bankruptcy, published in 1900. At page 385, the author says:

"Whether, indeed, this new provision in paragraph '*b*' of the present statute is intended to permit the proving of claims in contradistinction to or in addition to the debts mentioned in the various subdivisions in paragraph '*a*' of the section, or whether, on the other hand, it is a mere rule of procedure, enacted for the purpose of defining the mode in which the amount of certain debts, the right to prove which is given by paragraph (*a*) shall be ascertained, is not altogether free from question.

"The language of paragraph '*b*,' *taken by itself*, is broad enough to justify the conclusion that Congress intended to allow claims arising out of torts as well as out of contracts to be proved. But as we have seen under the preceding paragraph as to judgments obtained after the petition is filed the general tendency is to hold that the debt retains its original status and character and is not merged in the judgment. Consequently, it is difficult to believe, if the rule laid down in the preceding paragraph is correct, that there was any intention by Congress to include any debts under paragraph '*b*' which could not be provable by the operation of paragraph '*a*.' (5.) The specific cases of torts which might be proved under the act of 1867, to wit: conversion, etc., of property, are probably still provable *if the tort be abandoned and the action be brought as upon an implied contract.* But as to the mere torts arising out of the injuries to persons and the like, the construction of paragraph '*b*,' which would allow such claims to be liquidated subsequently to the filing of the petition, would result in much practical inconvenience, and while, as has been pointed out, the question is not yet free from doubt, the more reasonable conclusion is that paragraph '*b*' is governed and limited by the provisions of paragraph '*a*.'"

Judge Lowell, in his treatise on Bankruptcy, on pages 487, 488, says:

"Paragraph *b* does not enlarge the class of debts which may be proved, but provides that if any claim coming within the scope of paragraph *a* is unliquidated, it may be liquidated and proved. The use of the word 'claims' shows that it was not intended to include causes of action arising out of tort. The act of 1867 included 'unliquidated damages' in actions of tort for conversion. The difference in phraseology is significant.

"If this clause were interpreted in the other way it would include all actions for tort, whether property were involved or not. No bankrupt law has ever done this, and it would be a strange anomaly if Congress should have extended in this direction the scope of the law which is so much more restricted in other respects than former laws. The word 'claim' is used in this country as a synonym for 'demand' or 'debt.' In the numerous instances where it occurs in this act it has the same meaning. The provisions of § 17 also throw light on the meaning of paragraph *b*. It is there enacted that a discharge shall release a bankrupt from all his provable debts, except, among other things, judgments for willful and malicious injuries to the person or property of another. The inference is plain that Congress did not intend that a cause of action in tort should give rise to a provable debt till it was reduced to judgment. Because otherwise it would have included such cases of action in § 17, as it is incredible that Congress should intend to release the debtor from liability for a tort but not from liability on a judgment for a tort. These considerations show conclusively that Congress did not include torts within the scope of paragraph *b*."

In re Yates, 114 Fed. Rep., 365 (district court, N. D. California, Feb. 24, 1902), was a motion to vacate a decree by which Yates was adjudicated a bankrupt. The only debt mentioned in the schedule filed with the petition for adjudication was a judgment in an action for a willful and malicious injury to the person of one Risdon. An appeal was taken from this judgment.

In the course of the opinion De Haven, district judge, said:

"Subdivision '*a*' of section 63, of the bankruptcy act enumerates five different classes of debts which may be proved against the estate of the bankrupt, in one of which is included 'a claim for a fixed liability as evidenced by a judgment or instrument in writing, absolutely owing by the bankrupt at the time of the filing of the petition against him;' but a cause of action against him for unliquidated damages for a personal tort, such as is involved in the action of *Risdon v. Yates*, before referred to, is not within either of the classes named. Subdivision '*b*' of the same section provides:

"'Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.'

"This subdivision is not to be construed as authorizing the proof of claims not declared in subdivision '*a*' to be provable. Its object is simply to provide that unliquidated claims which fall within the scope of subdivision '*a*' are to be liquidated in such manner as the court shall direct (Lowell, Bankr., p. 487; and see, also, the well-considered opinion of Judge Marshall in the case of *In re Hirschman*, 4 Am. Bankr. R., 716; 104 Fed., 69)."

Opposing counsel say (Brief, 52): "*In re* Hirschman, 104 Fed. Rep., 69, is directly in point." So far as the case is in point it is "directly in point" against them. Judge Marshall said:

"The intention of Congress was to specify in sub-section '*a*' all provable debts, and in sub-section '*b*' to provide for the liquidation of such as, falling under sub-section '*a*,' were yet unliquidated. This was to prevent the construction of this act in the way the older bankrupt acts in England were construed. Under those acts unliquidated damages, although arising *ex contractu*, were held not to be provable debts, because the statutes seemed to require the creditor to swear to a precise sum (Lee & Chapman's case, 30 Ch. Div., 216). The care used to particularize various provable debts in sub-section '*a*,' negatives the extended construction of sub-section

'*b*,' urged by petitioners. If the latter sub-section authorizes the liquidation and subsequent proof of damages *ex delicto*, the whole subject could have been covered in very general language. Assuming petitioners' construction of section 63, sub-sec. '*b*,' it would embrace claims arising from any tort. There is no language in the section which can be held to include some, and not all, torts. Yet the general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs. It is hardly possible, if Congress had intended such a departure from the history of bankrupt legislation, that it should not have expressed the intent unmistakably."

In re Big Meddows Gas Co., 7 Am. Bankr. Rep., 697 (U. S. district court, W. D. of Pennsylvania, Feb. 25, 1902), it is said at page 699:

"Subdivision '*a*' of section 63 defines, under five clauses, claims that may be proved. While subdivision '*b*' provides for the precedent liquidation, and, thereafter, for the proof of unliquidated claims."

Old Colony Boot and Shoe Co. *vs.* Parker, 183 Mass., 557, 561 (June, 1903), was a bill in equity against directors and stockholders to establish their personal liability for a debt of the company to the complainant, as shown by a judgment of the supreme court of Massachusetts. The defendant Sampson was a director. In the course of the opinion the court said:

"The bankruptcy act of 1898 permits the proof among others of '*a*, debts * * * (4) founded upon an open account, or upon a contract express or implied,' and provides that '*b*, unliquated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.'

"It would seem that this clause does not provide for an additional class of liabilities, but for a method by which such of the liabilities described in clause *a* as are unliquidated may be liquidated and proved. *We are of the opinion*

that clause b does not mean anything more than the language used in the bankruptcy act of March 2, 1867, c. 176, sec. 19, that where the bankrupt is liable * * * for unliquidated damages arising out of any contract or promise, or an account of any goods or chattels wrongfully taken, converted or withheld the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate,' and that the liability of the defendant Sampson, as a director does not arise out of any contractual obligation or promise, and is not such an unliquidated claim, and by the express language of the act of 1898, sec. 17 (30 U. S. Sts. at Large, c. 541), the bankrupt is not released by a discharge unless the claim is not only provable, but is also a provable debt; not being a provable debt" etc.

It will be noticed that the provision of the act of 1867, allowing "unliquidated damages * * * on account of any goods or chattels wrongfully taken, converted or withheld" to be assessed and proved, was omitted from the act of 1898. The omission of the provision referred to very clearly indicates that it was the intention of Congress to permit no claim for unliquidated damages arising out of torts to be liquidated or proved under the provisions of the act of 1898. The omission, not of a word or two which might, inadvertently, have been left out, but the omission of an important and express provision, must mean the omission of the purpose with which the provision was inserted in the act of 1867.

Watertown Carriage Co. vs. Hall, 77 N. Y. Supp., 1028 (supreme court, appellate division, third department, September 3, 1902), was an action for conversion. Justice Smith, in delivering the opinion of the court, said:

"This case is now before us upon a re-argument ordered. The case as first decided, is reported in 66 App. Div., 84, 72 N. Y. Supp., 466. In the briefs presented upon that argument, it was stated that the bankruptcy law of 1898, was a substantial re-enactment of the act of 1867, and in the decision this fact was assumed. Upon a motion for re-argu-

ment, portions of the act of 1898 were called to our attention materially differing from the provisions of the act of 1867, and which, upon consideration, call for a reversal of the decision which we then made, and the affirmance of the decision of the court below. By section 17 of the act of 1898 it is provided that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except certain debts specified. By section 63 is defined what are provable debts. Under that section there are five classes of debts which may be proved against a bankrupt and allowed against his estate: (1.) A fixed liability, as evidenced by a judgment or an instrument in writing, etc. (2, 3.) Certain sums due as taxable costs. (4.) Debts founded upon an open account or upon a contract, express or implied. (5.) Judgments upon provable debts obtained after the filing of the petition and before the consideration of the bankrupt's application for a discharge. In none of these sub-divisions is included the claim set forth as a cause of action in the plaintiff's complaint herein. Under section 5067, Rev. St. U. S., 1875, which was a part of the bankruptcy law of 1867, among the provable debts were included 'all demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him.' Under that act it is clear, as was held, that a cause of action for conversion was released by a discharge in bankruptcy. In the present statute, however, this provision nowhere appears, and a demand for a conversion of property as such is no longer a provable debt, and therefore no longer released by a discharge in bankruptcy. Subdivision '*b*,' § 63, provides for the liquidation of unliquidated claims, but the unliquidated claims there referred to are claims specified in subdivision '*a*' of the section as provable debts. They are those provable debts which have not been so far liquidated as to make certain the amount which should be allowed against the bankrupt. This would seem to be indicated by comparison with the former bankruptcy law (Rev. St. § 5067), above cited, where similar provision is found. It is not necessary here to discuss what would be the situation if in the complaint the plaintiff had chosen to waive the tort. It has not so elected. (See Coll. Bankr., p. 399.)

"Appellant argues that the exceptions specified in section 17 indicate an intention to make provable other debts than

those specified in subdivision '*a*' of section 63. To this we disagree. The specification in section 63, subd. *a* of what are provable debts is clear, and will not be extended except by necessary implication. The discharge in bankruptcy constituted no defense to plaintiff's complaint, and the demurrer was properly sustained.

"Judgment affirmed with costs with usual leave to amend. All concur."

The claims of the defendant in error were for unliquidated damages arising out of tort, and did not come within any of the provisions of paragraph *a*. It was settled by this court, in the recent case of Dunbar *vs.* Dunbar, 190 U. S., 340, that such claims could not be liquidated or proved under the provisions of paragraph *b*. Mr. Justice Peckham, delivering the opinion of the court, said:

"In section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against the estate. This paragraph *b*, however, adds nothing to the class of debts which may be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim coming within the provisions of section 63*a* to be liquidated as the court should direct."

With reference to "debts which may be proved," counsel for plaintiffs in error state their contention as follows (Brief, 51):

"Two views of paragraphs (*a*) and (*b*) and their relation to each other suggest themselves:

"1. That paragraph (*a*) classifies all claims that are provable, and paragraph (*b*) provides for the liquidation of such of them as are unliquidated at the date of the filing of the petition in bankruptcy.

"2. That paragraph (*a*) refers to claims of a contract character only, while paragraph (*b*) refers to, and includes additional claims not necessarily of a contract character, but of whatever character, so long as the demand and the right of action existed at the time of the filing of the petition."

Both views with regard to paragraph *b* cannot be correct. If the first view be right, the second is not. But counsel seek to avoid the danger of adopting the first view only, and rejecting the second, by saying:

"Under either view, the demand of defendant in error is a provable debt, because: 1. Debts of a bankrupt may be proved and allowed against his estate which are * * * (4) founded upon account or upon a contract express or implied (P. (*a.*) sec. 63). That is to say: if a claim 'may' be proved—if it possesses a provable character or quality in any view—it is a provable debt. The demand of the defendant in error possesses that quality. It is of a quasi-contract character. He may waive the tort and recover for money had and received to his use on an implied contract. This is the law of conversion."

Let us see by what process of reasoning counsel endeavor to show that the claims of defendant in error were provable under paragraph *a*. They do not say that the claims made by him were "founded upon an open account or upon a contract express or implied," because such a statement would be manifestly absurd. On the contrary, they admit (Brief, 49) that "the action, in form, is founded upon the alleged acts of fraud by conversion or misrepresentation of plaintiffs in error;" but they paraphrase the provision of the statute which allows the proof of debts which are founded "upon a contract, express or implied," by saying: "That is to say, if a claim *may* be proved—if it possesses a provable character or quality in any view—it is a provable debt." This is equivalent to saying, "If a debt is provable, it is a provable debt." Again, counsel say: "The demand of the defendant in error possesses that (provable) quality. It is of a quasi-contract character." Counsel probably did not mean precisely what they said. What they undoubtedly meant to say is indicated by the sentence which immediately followed:

"He may waive the tort and recover for money had and received to his use, as on an implied contract. This is the law of conversion."

Their argument, then, amounts to this: *If* the defendant in error had waived the tort—*if* he had waived the fraud—*if* he had founded his claims upon an implied contract—*then* his claims would have been provable. Suppose that to be so; what has it to do with the case at bar? Absolutely nothing. That question was not before the courts below for decision. It is not a question for decision in this court. The question is, not what kind of claims the defendant in error *might* have made; nor would the claims which he might have made have been provable; but what kind of claims *did* he make, and were the claims which he did make, provable? Is it not a queer kind of logic to predicate a proposition upon something which confessedly has no existence?

In Bixby *vs.* United States, 188 U. S., 405, this court, speaking by Mr. Justice Harlan, said:

"A party may, in some cases waive a tort; that is, he may forbear to sue in tort, and sue in contract, when the matter out of which his claim arises has in it the elements both of contract and tort."

If the matters out of which the claims of the defendant in error arose had in them the elements both of contract and tort, it is true that he might have waived the tort and have based his claims upon the legal fiction of an implied contract that plaintiffs would refund the money which they had obtained from him by means of false and fraudulent representations, and would also pay over to him the money which they had received from the sales of his property, which they had sold with the intent to cheat and defraud him. But what he *might* have done is one thing; what he *did* do was quite another and different thing. If he might have waived the

fraud and sued in assumpsit for money had and received, he did not see fit to do so. He was under no obligation to waive the fraud and base his claims upon an "implied contract." Not having done so, his claims were not provable.

Williamson vs. Dickens, 27 N. C. Rep., 259, "was an action on the case, in which the plaintiffs declared in tort for breach of contract, and also in trover for the conversion of certain bonds, notes and attorneys' receipts, which the plaintiffs had placed in the hands of the defendant, to be by him collected for them."

Nash, J., in delivering the opinion, said:

"And all the court agree, that when a plaintiff has an election as to the form of his action, the choice of the action is decisive of the question. So in the case of *Parker v. Crole*, 2 M. & P., 150, and 5 Bing., 63, it was decided that when the defendant, a broker, sold out the stock of the plaintiff contrary to his orders the plaintiff had an election either to affirm the sale and sue the defendant for the money received by him, or to bring an action of tort, and as he had brought the latter action, *the defendant was not protected by his certificate of bankruptcy*. These cases abundantly prove that, when the plaintiff has an election, he is not bound to prove his claim as a debt under the defendant's commission, though he may; *and when he sues in tort, the defendant cannot avail himself of the protection of the bankrupt law. * * * These damages are unliquidated, and can be ascertained only by a jury.*"

In Hughes *vs.* Oliver, 8 Pa. St. Rep., 426, which was an action on the case for deceit, the court said:

"I cannot believe that where a party has been guilty of a wrong or a fraud, that it was the design of the statute to protect him from the consequences of it, *merely because he* (plaintiff) *may*, if he thinks proper, *waive the tort and resort to an action as for money had and received*. If a man takes the horse of another, and afterwards sells him, the owner may waive the tort and recover the price in an action for money had and received; but is he bound to do so when possibly it may happen that it has been sold for half its value? Would the owner be compelled to prove a debt

*under the commission of bankruptcy? It seems to me clear that he would not. He, may, it is true, but he is not compelled to do so. * * * Where the right to damages at all, and also the amount of them, depend upon circumstances of which a jury alone can judge, and which therefore it is requisite the intervention of a jury to ascertain, such damages are not susceptible of proof under a commission.*"

In Graham *vs.* C., M. & St. P. Ry. Co., 10 N. W. Rep., 608, 612 (cited by plaintiffs in error), it is said:

"The plaintiff may waive the tort when the defendant has possession of his money, and sue upon the implied promise to refund it; but he is not compelled to waive it in order to recover, and may, if he sees fit, recover upon the tort, and make that the foundation of his action."

Bradner vs. Strong, 89 N. Y. Rep., 299, 306, was an action to recover damages sustained in consequence of the false and fraudulent representations of the defendants. The defendants procured certain promissory notes in March by representing that certain notes given in February had not and could not be used. In the opinion the court said:

"The claim of the plaintiff for damages on account of the fraud committed upon them by the defendants was not discharged by the bankruptcy proceedings. Debts only are provable in bankruptcy, and, therefore, only can be discharged in bankruptcy (U. S. R. S., secs. 5014, 5017, 5118). *This claim for damages could no more be discharged in bankruptcy than a claim for damages caused by libel, slander or an assault and battery (Morse v. Hutchins*, 102 Mass., 439; *In re Jones*, 2 N. Bank. R., 27). The cases of *Hennequin v. Clews*, 77 N. Y., 429, 33 Am. Rep., 643, and *Neal v. Clark*, 95 U. S., 704, do not apply to a case like this."

On appeal to this court (Strong *vs.* Bradner, 114 U. S., pp. 555, 560) Mr. Justice Harlan, delivering the opinion of the court, said:

"That representation—as the jury on ample [illegible]—was made with the intent to deceive the plaintiffs in reference to the

grand scale of things, and to value them in a way that defendants have they would not otherwise have done or been asked to do. If Strang's conduct does not constitute positive fraud or fraud in fact, involving intention, wrong it is difficult to conceive what circumstances would have amounted to fraud of that character.

"It is contended, however, that as Strang & Holland were sued under a legal obligation, apart from any responsibility for the alleged fraudulent representations by Strang, to protect the plaintiffs against liability on the notes dated in March, the latter could have a claim against the estate of the several bankrupts for such amounts as they were compelled to pay on account of their being accommodation makers and indorsers, consequently it is argued the defendants are released, by their respective discharges in bankruptcy, from the present claim for damages. To this proposition there are two answers: 1. *While the plaintiffs might have based their claim entirely upon the legal obligation of the bankrupts to take up the notes at their respective maturities, they were not bound to move their right to prove against the defendants for damages on account of fraud in procuring their execution.* This action is brought to recover damages for the deceit practised upon the plaintiffs. *The claim here asserted is not one from which the bankrupts are protected by their discharges, for it is not a claim provable against their estate in bankruptcy* (Rev. Stat., sec. 5057-5073, inclusive, 5117, 5118). 2. But had the plaintiffs waived their right to claim damages specifically for the deceit practised upon them and made a claim against the estate of the bankrupts based wholly upon their legal obligation to save plaintiffs harmless on account of their being the makers and indorsers of the notes in question, or if the present action had been based upon that obligation, and not upon the fraud committed by defendants, it would not follow that the debts sued would be protected by their discharges in bankruptcy."

It is simply absurd to say that the claim made by the defendant in error was provable because he might have made claims of an entirely different character from those which he did make, and that such claims if made would have been provable.

In support of their "first view," counsel for plaintiff in error have cited several cases to show that if a claim is of such a character that the tort may be waived and recovery had in assumpsit, then, if the claimant sees fit to waive the tort and base his claim upon the implied contract, the claim may be proved. That is purely an academic question. It is not pertinent to any issue in the case at bar. This, we think, has been sufficiently shown.

It will be noticed that counsel have not cited a *single case* in support of their "second view," namely, that "paragraph *b* refers to and includes claims, not necessarily of a contract character, but of whatever character."

The act of 1867 provided for the liquidation and proof of "unliquidated *damages* arising out of any contract or promise." The act of 1898 provides for the liquidation and proof of "unliquidated *claims*" which are "founded upon an open account or upon a contract, express or implied." The former act provided that the court might "cause such damages to be assessed in such mode as it may deem best." The act of 1898 provides that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

In Old Colony Boot & Shoe Co. *vs.* Parker, 183 Mass., 557, 561 (June, 1903), the court said:

"We are of the opinion that clause *b* does not mean anything more than the language used in the bankruptcy act of March 2 1867 c. 176 sec. 19, that where the bankrupt is liable * * * for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such manner as it may deem best, and the sum so assessed may be proved against the estate."

A claim which could not be liquidated and proved under the act of 1867 certainly cannot be liquidated and proved

under the act of 1898. Under the act of 1867, it was held by this court in Bradner *vs.* Strang, 114 U. S., 555, 560, that a claim for damages on account of positive fraud of the bankrupt (procuring the execution of promissory notes by false representations) was not provable in bankruptcy. The doctrine of that case is strictly applicable to the case at bar, and it would seem that further discussion of the point under consideration is wholly unnecessary.

It may be mentioned here that the plaintiff received no share of the dividend declared by the receiver appointed by the court at the time of defendant's failure. The plaintiff did not file his claims with the receiver, because they were unliquidated and contested, and could not be proved except in the manner in which they were proved, namely, by obtaining a judgment.

While the record does not show that the State supreme court passed upon the question as to whether the claims of plaintiff in error were provable, yet, the question appears of record, and was raised and argued in each of the courts below, and calls into exercise the jurisdiction of this court. The question is involved in the main question: Was the discharge in bankruptcy of plaintiffs in error a bar to the claims in controversy? If the claims were not provable, the discharge was not a bar, and the judgment should be affirmed (Collier *vs.* Stanbrough, 6 How., 21; Dewey *vs.* Des Moines, 173 U. S., 197, 198; Murdock *vs.* Memphis, 20 Wall., 590, 636).

II.

The qualifying clause in subdivision 4 of section 17 of the bankruptcy act of 1898, namely, "while acting as an officer or in any fiduciary capacity," refers, both grammatically and logically, to its next antecedent only, which is the term "defalcation," and does not apply to or restrict the terms "fraud" or "embezzlement."

Section 17 of the bankruptcy act of 1898 is as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

1. The presumption is that the reading of a statute according to its grammatical construction gives its correct sense. The grammatical construction should be followed unless it will pervert the legislative intent.

In Lake County *vs.* Robbins, 130 U. S., 662, 670, this court said:

"To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them."

We desire to call the attention of the court to the case of The City Safe Deposit and Surety Co. *vs.* Lee, 107 Ill. App., 263. 204 Ill. Supreme Court, 69. Our failure to cite the case under point II, before our brief was printed, was an oversight. The case is directly in point.

In Endlich on Interpretation of Statutes, section 2, the author says: "Phrases and sentences are to be construed according to the rules of grammar."

In 26 Am. & Eng. Encyl. of Law (2d ed.), page 613, it is said:

"In accordance with strict grammatical construction it is said that qualifying words and phrases should be confined to their *next antecedent*, but this rule is frequently neglected, and is always subservient to the legislative intent."

In *Cushing vs. Worrick*, 9 Gray, 382, 385, the main question related to the construction that should be given to the following clause:

"And also reserving to the town of Hull the privilege of the shores, and of feeding all lands not comprehended within the aforementioned bounds."

The court said:

"The question is whether 'the privilege of the shores' including, of course, the right to take seaweed, is limited to shores 'not comprehended within the aforementioned bounds;' and the court are of the opinion that this privilege is not so limited.

"It is not necessary to resort to the draft of the bill as passed to be engrossed, in order to explain the statute as actually engrossed; for the general rule is that the punctuation is no part of a statute (Barrington on Sts. (5 ed.), 439, note; 3 Dane Ab., 558; Dwarris on Sts. (2d ed.), 601). *And in this case the omission of the comma between 'lands' and 'comprehended' makes the case clear in favor of the defendants; while its insertion does no more than to make it grammatically possible to apply the limiting clause to the shores, as well as to the feeding lands. But such a clause is ordinarily to be confined to the last antecedent, unless there is something in the subject-matter which requires a different construction* (Finch, Lib. 1, c. 3; *Noyes v. Max* (6 ed.), 2; Dwarris on Sts., 590, 591, and authorities cited)."

In *State vs. Jernigan*, 3 Murphey, 12, 18, Chief Justice Taylor, in delivering the opinion of the court, said:

"The rule of grammar that words shall be referred to the next antecedent, has been adopted and enforced in the law from an early period, and has had a direct influence upon the decision of many cases. But much to the credit of the sages of the law, it has uniformly been received and practiced upon, with its proper limit and qualification, so as to fulfill the intention of the legislature in civil matters, to ascertain the design of parties in private contracts, and to furnish a rational exposition of every instrument, public and private, that called for the judgment of a court. As a rule of legal construction, it stands thus, *Proximo antecedenti fiat relatio, nisi impediatur sententia;* and in the various cases in which it has been introduced, it has been rendered instrumental towards effecting a right understanding of the subject, and rendering substantial justice. A man agrees to abide the award of J. S., who awards that he shall pay before such a feast ten pounds to another, and that *then* the other shall make him a release. The word *then* shall not be referred to the feast, but to the time of payment of the money. The statute 32 Henry VIII. ordains that none shall buy right or titles in land, unless such persons have been in possession of it, or of the reversion or remainder of it, or have taken the rents and profits of it, for the space of one whole year next before. Here these words, 'by the space of one whole year,' *shall be referred only to the sentence next before, viz.: to the taking the rents and profits.*"

Dearborn vs. Inhabitants Brookline, 97 Mass., 466, 469, involved the proper construction of the following section of the statute:

"SEC. 9. Any town or city may appropriate money for suitable buildings or rooms, and for the foundation of a library a sum not exceeding one dollar for each of its ratable polls in the year next preceding that in which such appropriation shall be made."

Chief Justice Bigelow, in delivering the opinion of the court, said:

"We cannot bring ourselves to entertain a doubt concerning the interpretation of the statute upon which this controversy hinges. In the first place the *grammatical construction* of the words does not lead to the conclusion for which the petitioners contend. A town or city is authorized to '*appropriate money for suitable buildings or rooms*,' *and for* '*the foundation of a library a sum not exceeding one dollar for each of its ratable polls*' (Gen. Sts., sec. 9). The words 'not exceeding,' in that sentence do not necessarily qualify and limit the entire first clause. On the contrary, we think it apparent that they were intended to restrict the latter provision with which they are immediately connected; that is, that the intention of the legislature was to put a precise limit on the sum to be expended for books, and not on that to be appropriated for buildings or rooms. Unless this interpretation is adopted there would be an inexplicable redundancy in the sentence. The use of both the words money and sum would be unnecessary. One of them would be wholly superfluous. But, as both are used *ex industria*, an intent is indicated to express a meaning which the use of one alone would not clearly set forth. Both words are made operative and effective by construing them as applied each to a distinct subject, the one to the cost of buildings or rooms, the other to the purchase of books."

In *Whetmore vs. Whetmore*, 17 Pa. County Repts., 11 (1896), the court, in construing a provision of the statute, said:

"The operative words of this act pertinent to the question before us are these: 'The husband * * * or the wife * * * may exhibit his or her libel to the judges * * * in term time, or to one of the judges * * * in vacation at least thirty days before the next term * * * and thereupon a subpœna shall issue from the said court, etc., * * *

"Punctuation is no part of a statute. Courts should punctuate only to promote the manifest intent of the legislature in construing its acts. Where the intention is obscure or doubtful they may not only punctuate, but may transpose clauses or phrases to make the meaning clear. Yet, unless, the following of the grammatical construction of a statute will obviously pervert the plain legislative intent,

it should be adhered to in construing statutes susceptible of more than one construction. Following this rule, and, adhering to what we regard as the plain *grammatical construction* of the section under consideration, we hold that the clause 'at least thirty days before the next term' *relates only to its next antecedent* 'or to one of the judges of the same court in the vacation.'

"For it is a fundamental rule of construction that a relative word or clause has reference to its *first antecedent only*, unless to restrict its application will manifestly do violence to the plain intent of the language employed in connection with it. And especially is this so where such next preceding antecedent is introduced, as is the case here, by the disjunctive 'or,' always assuming that manifest intent or object will not be defeated by such construction."

Quinn vs. Lowell Electric Light Corp., 140 Mass., 106, was an action in tort for a nuisance in maintaining and using a steam-engine, boilers and machinery for generating electricity for lighting purposes at the defendant's works within 300 feet of plaintiff's dwelling-house. Defendant justified under a license from the mayor. In the opinion of the court, delivered by Judge Allen, he said:

"The license was under the Pub. Sts., c. 102, sections 40, 47, which prohibits the erection of a stationary engine within five hundred feet of a dwelling-house or public building without a license, in any city or town in which the statute of 1862, c. 74, has been adopted 'at a legal meeting of the city council of the city or the inhabitants of the town called for that purpose.' The statute of 1862, c. 74, was adopted at a regular meeting of the city council, and not at a special meeting called for that purpose. We think that the requirement that the adoption shall be at a meeting called for the purpose is limited to an adoption by the inhabitants of a town, and does not apply to the action of a city council, which is usually composed of different bodies, acting at regular meetings and under prescribed rules of procedure."

Price *vs.* Price, 10 Ohio St. Rep., 316, involved the construction of a section of a statute relating to appeals in certain cases. The court said:

"That section as it stands punctuated, appears at first blush to be somewhat obscure. This apparent obscurity arises mainly, if not entirely, from its defective and improper punctuation. The section when properly punctuated reads thus: Etc. As repunctuated, the court construed the statute."

In *Hamilton vs. Steamboat, etc.*, 16 Ohio St., 428, the court sustained a motion in arrest of judgment because the petition did not contain an averment that the defendant was a steamboat over the tonnage of twenty tons. In the opinion, the court said:

"Whether the court erred in this holding depends on what is the proper construction of the first section of the act upon which the action is founded. The act was passed February 26, 1840, and the first section, as amended March 10, 1860, reads as follows:

"'That *all* steamboats and other water crafts *of twenty tons burden and upwards*, navigating the waters within or bordering upon this State, shall be liable, *and such liability shall be a lien thereon* for all debts,' etc.

"The only change in the original section, for which this was substituted, was made by inserting therein the words here italicized for the purpose only of showing, without repeating, the language of each section.

"It is clear, from the amended section, that the legislature intended to limit the special remedy thereby given against water crafts other than steamboats, to those of twenty tons burden and upwards; but it is not so clear that such was the intention as to steamboats. There is not the same reason for exempting the latter as there is the former from the operation of the statute. * * *

"But for the punctuation as it stands, there could be little doubt but that this was the meaning of the legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the law-makers, disregard the punctuation, or re-punctuate, if need be, to render the true meaning of the statute (10 Ohio St. Rep., 316; Bouv. Law Dic., 347, 402).

"If the punctuation in the first line followed the word 'steamboats,' the purpose for which the word 'all' was in-

serted in the amendment, as well as the true meaning of the section would be more obvious.

"But we think all doubt as to the proper construction of the section may be settled by the application of the rule that, in the construction of revised or amended statutes, the original statute will not be regarded as changed further than clearly appears to have been intended by the legislature (2 Hill, 380).

"The statute, before the amendment, had given a remedy against steamboats and other water crafts by name without reference to their tonnage. The amendment clearly limits this liability of water crafts other than steamboats, to those of twenty tons burden and upwards; but it does not appear clearly that the same change was intended to be applied to steamboats; on the contrary, the amendment is fairly, if not clearly, susceptible of directly the opposite construction; and is therefore a proper case for the application of the foregoing rule. It follows that actions against steamboats are not limited to those of twenty tons burden and upwards," etc.

In *Zimmerman vs. Willard et al.*, 114 Ill., 364, Willard made an assignment for the benefit of his creditors, and executed and acknowledged the same in the city of St. Louis. The deed of assignment was recorded in Union county, where Willard resided. Chief Justice Mulkey, in delivering the opinion of the court, said:

"The point is also made that the court erred in admitting the deed of assignment in evidence, against the objections of appellant. The grounds of the objection are twofold: First, that the deed was acknowledged outside of the State; and second, that the certificate of acknowledgment is insufficient in this, that it does not state the grantor appeared before the notary *in person*. The first section of the act of 1877, under which the assignment was made, provides, among other things, that 'every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside,' etc. The deed in question was, as we have already seen, duly recorded in Union county, where Willard resided; but the contention of appellant is, that it should also

have been acknowledged there. We do not think that this is a fair or reasonable construction of the language cited. While the object of the legislature in requiring the deed to be recorded in the county where the assignor resides, etc., is quite apparent, yet no possible reason is perceived for requiring it to be acknowledged there. The place of acknowledgment would therefore seem to be wholly inconsequential, and to limit it to a particular place would certainly, in many cases, lead to great inconvenience, and in some would probably operate as a denial of the right of a failing debtor to make such an assignment at all. A construction which would lead to such results ought not to be adopted unless the statute plainly and imperatively demands it. We do not think it does in this case. Had a comma been inserted after the word 'acknowledged,' as it should have been, *no one would have thought of that word being limited by the qualifying member of the sentence, 'in the county where the person or persons making the same reside,'* etc., and we are of opinion that sound reason and public convenience alike require the provision in question to receive the same construction as if the comma had been so inserted. We therefore hold that the requirements of the statute were fully met by the recording of the instrument in Union county, the place of Willard's residence."

In their brief in the courts below counsel said:

"Punctuation may not be entirely controlling in the interpretation of the law, but it has some bearing."

That is undoubtedly true, and, therefore, we agree with them. In the State appellate court, counsel for plaintiffs in error filed separate briefs, in each of which a comma was inserted between the word "defalcation" and the qualifying clause, "while acting as an officer, or in any fiduciary capacity" (a remarkable coincidence!). As so punctuated, they proceeded to interpret the statute. They based their construction of the subdivision in question largely upon the punctuation. After we had shown that their punctuation was incorrect and misleading, they said in their reply brief: "We are sure that the court will acquit any of the counsel

from any *design* to mislead it." By implication they admitted that their punctuation was misleading. How misleading? Certainly in no other way than by leading to a wrong construction of the statute; and yet they insist in this court upon the same construction that they contended for when their incorrect punctuation made their contention plausible from a *grammatical* point of view.

Even now the statute, as quoted in their brief, is incorrectly punctuated. They omit the comma between the word "misappropriation" and the following word "defalcation," and then make the misstatement that "It is admitted that the terms 'misappropriation' and 'defalcation' are so related" (Brief, p. 66).

In the court below counsel further said:

"If the words of the fourth clause are to be read in their plain, grammatical sense, in the only sense that can be put upon them without violently wresting them from their connection, and as it were breaking the backbone of the sentence in several places, there is an end to this case. But the appellee says, as we understand him, that the sentence should read as follows: 'or (fourth) were created by his fraud; embezzlement; misappropriation; or defalcation while acting as an officer, or in any fiduciary capacity.'"

Counsel virtually admitted that if semicolons had been used instead of commas the punctuation would show that our construction of the statute was correct.

Our contention is that, in so far as punctuation is a guide in the interpretation of the law, the punctuation of the subdivision in question requires the construction which we have placed upon it. That construction is demanded also by the obvious and natural import of the language, giving to it the ordinary grammatical construction. If, however, it were true that semicolons should be substituted in the place of commas "for the purpose of arriving at the real meaning and intention of the law-makers," then we say that the court

would repunctuate the subdivision in question. In Hamilton *vs.* Steamboat, etc., 16 Ohio St., 428, the court said:

"Courts will, however, in the construction of statutes for the purpose of arriving at the real meaning and intention of the law-makers, disregard the punctuation or *repunctuate*, if need be, to render the true meaning of the statute" (10 Ohio St. Rep., 306; Bouv. Law Dictionary, 347, 402).

There are numerous authorities to the same effect.

In *Price vs. Price*, 10 Ohio St., 316, the court repunctuated a section of the statute by substituting semicolons for commas, in order to carry out the intention of the legislature and make the meaning of the statute clearer; and it probably never occurred to the court that it had been guilty (as counsel would say) of "breaking the backbone of the sentence in several places," or, in fact, of breaking any bones whatever in the body of the sentence.

Cushing *vs.* Worrick, *supra;* Price *vs.* Price, *supra*, and Hamilton *vs.* Steamboat, etc., *supra*, were cited by this court with approval in Hammock *vs.* Loan & Trust Co., 105 U. S., 77, 84, and again in Joy *vs.* St. Louis, 138 U. S., 1, 32.

In a monograph on the subject of "Punctuation—How Considered in the Law," published in 45 Central Law Journal, 229, 236, it is said:

"As far as the office of punctuation marks may be supposed to be understood by the one using them (or, perhaps, commonly understood), the rule concerning the use of such marks may be applied in construing the instrument. * * * In some of the cases where the judges seem, in their statement of the rule, to give an undue force to punctuation, we find them actually deciding the case on the intention, which in reality was only aided by the punctuation. In other cases where the judges affect to give not the slightest notice to punctuation, they are really deciding that the significance urged for the punctuation in question is a strained and unnatural one. Some of the judges are prone to rail at punctuation in general whenever they refuse to allow it to decide the case in question; others are inclined to elevate it in impor-

tance beyond its proper place whenever they find that it chimes with the intention as they see it. Properly, punctuation has a position in the law, though a subordinate one. Being used in the instrument with intent to make the meaning plainer, it should certainly be considered in court to aid in discovering that meaning."

In *Albright vs. Payne*, 1 N. E. Rep., 20, it is said:

"Punctuation may aid in arriving at the meaning of a statute, but does not control."

In Joy *vs.* St. Louis, 138 U. S., 1, 32, the question was whether certain words in an instrument qualified not only the immediate clause, but also a prior one. It was contended that the qualifying clause applied to both the preceding clauses. This court said:

"As against this it must be observed that, grammatically, *a relative clause generally qualifies its immediate antecedent*, and therefore, in this case, would refer simply to that clause which provides for the assumption by the Kansas road. This natural grammatical construction is strengthened by the *punctuation*—a comma after the words 'party of the second part' and none after the words 'party of the third part,' which seems to separate the entire first clause from the second and qualifying terms. I know that the matter of punctuation is never relied upon to defeat the obvious intent; but, when the meaning is doubtful, the punctuation is certainly a matter tending to throw light upon it."

"Further there are not simply two, but really three antecedent clauses, the first one being 'the terms of the said contract between them,' that is, the two railroad companies. Very clearly this qualifying clause does not refer to that, and therefore it should not be held to qualify the second, unless the obvious intent compels such construction."

2. The qualifying clause "while acting as an officer, or in any fiduciary capacity," so far as it relates to debts, has reference only to debts created by a breach of trust in the administration of trust property *lawfully in the possession* of an

officer or trustee of an express trust and held by him in his official or fiduciary capacity. The clause has not, nor was it ever intended to have, any application to debts which were not incurred in the administration of a trust estate. It is obvious that the clause is not applicable to debts created by torts committed in obtaining the *possession* of property—for example, debts created by theft or robbery or by obtaining property by means of false and fraudulent representations. That being so, it may be asked, To what class of debts, created by positive fraud, does the clause apply?

It cannot be held that the clause applies to some classes of debts created by positive fraud, but not to all. It is our contention that the clause in question has no other or different meaning or application in the act of 1898 than it had in the acts of 1841 and 1867. Under the act of 1867 it was never held, or even suggested, that the clause "while acting in any fiduciary character" applied to or restricted the term "fraud." This is conceded by plaintiffs in error.

Neither does the clause in question restrict the term "embezzlement," which is a specific term and imports the violation of a trust. In Moore *vs.* United States, 160 U. S., 268, this court held that "embezzlement is the fraudulent appropriation of property by a person to whom it had been intrusted, or into whose hands it has lawfully come; and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking." The correctness of the above definition of "embezzlement" was reaffirmed by this court in the recent case of Grin *vs.* Shine, 187 U. S., 181, 196.

The trust violated by an embezzler may, however, be either an express or technical trust, or one *implied by law.* But the phrase "fiduciary capacity" refers only to technical or express trustees and does not apply to clerks, servants, or agents who embezzle the property of their employers and thereby violate an *implied trust.* The clerk, servant, or

agent who commits the crime of embezzlement, and violates an implied trust, is just as much of a malefactor as the technical trustee who commits a like crime and violates an express trust.

In this connection it may be said that embezzlements committed by clerks, servants, and agents are of common occurrence, while embezzlements committed by technical trustees are comparatively few.

We submit that in regard to the exception of debts from the operation of a discharge, the statute makes no distinction whatever between the embezzler who violates an express trust and the embezzler who violates an implied trust; and no substantial reason can be given why a distinction should be made, the degree of guilt or moral turpitude being as great in the one case as in the other. In Central National Bank *vs.* Connecticut Mutual Life Ins. Co., 104 U. S., 54, this court, by Mr. Chief Justice Fuller, said:

"What is a fiduciary relationship? It is one in which, if any wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of a *cestui que trust*. * * * There is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position."

That the bankruptcy act of 1867 excepted from the operation of a discharge not only debts created by positive fraud, but also debts created by embezzlement, whether the trust violated was an express trust or one implied by law, has never been questioned. There is nothing in the act of 1898 to indicate that a change of policy in that regard was ever contemplated by Congress. Indeed it would be strangely inconsistent, and an anomaly in the law, to provide for the release of one, and by far the largest, class of embezzlers, from debts created by their embezzlement, and to refuse to release another class of embezzlers from debts likewise created by their embezzlement. *If the term "embezzlement,"*

which imports a trust relation, is not limited to officers and technical trustees, it certainly cannot be said that the term "fraud," which does not imply any trust relation whatever, is limited or restricted by the clause under consideration.

But when we come to consider the meaning and scope of the term "defalcation," it will be further apparent that the clause "while acting as an officer or in any fiduciary capacity" does not apply to or restrict either the term "fraud" or the term "embezzlement."

In the American and English Encyclopedia of Law (vol. 9, p. 166, 2d ed.) a definition of the term defalcation is given as follows:

"Defalcation is a failure of one who has received money in trust or in a fiduciary capacity, to account and pay over as he ought; and in this sense the word applies particularly to the acts of public and corporate officers."

In Black's Law Dictionary the term "defalcation" is thus defined:

"The act of a defaulter; misappropriation of trust funds or money held in any fiduciary capacity; failure to properly account for such funds. Usually spoken of officers of corporations or public officers."

Debts created by "defalcation while acting as an officer or in any fiduciary capacity"—in other words, official or fiduciary debts—are those, and those only, which arise from a failure to pay over or properly account for trust funds, the *possession* of which was lawfully obtained by an officer or technical trustee in his official or fiduciary capacity. Defalcation imports the misappropriation of property *lawfully acquired* and held in trust. The non-payment of a debt or liability arising from the acquisition of property by fraud or crime is not a defalcation.

As before stated, the clause, "while acting," etc., so far as it has reference to debts, applies only to official or fiduciary debts incurred by an officer or by a trustee of an express

trust. Debts are fiduciary only when a trust relation exists between the debtor and the creditor at the time the debt is created. In Upshur *vs.* Briscoe, 138 U. S., 378, this court said:

"It is to be noted that the language of section 33 of the act of 1867 excepts debts created by the bankrupt 'while acting in any fiduciary capacity;' and the language would seem to apply only to a debt created by a person who was acting in any fiduciary character when the debt was created."

Fiduciary debts, in the sense in which the term "fiduciary" is used in section 17 of the bankruptcy act, are those only which a technical or express trustee owes to the *cestui que trust* or beneficiary. Such debts the trustee must pay when properly called upon to do so; otherwise, he is in default; he is a defaulter; his failure "to properly account and pay over as he ought" is a defalcation. If there is no defalcation there is no debt (Madison Tp. *vs.* Dunkle, 114 Ind., 262, 265). Therefore, the term "defalcation" is broad enough to cover every indebtedness for which the debtor becomes liable, either as an officer or as a trustee of an express trust. Section 1 of the bankruptcy act of 1841 provided:

"Debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity" should not be released by a discharge.

In Chapman *vs.* Forsyth, 2 How., 202, 208, this court, speaking of the act of 1841, said:

"A misapplication of trust funds, as declared, covers the enumerated cases in the 1st section."

The enumerated cases in the 1st section related to debts created by defalcation while acting in a fiduciary capacity, and the court held that a misapplication of trust funds covered such cases. A misapplication of trust funds was

characterized by Congress as a "defalcation." The term "defalcation" and the clause, "while acting," etc., have precisely the same meaning and application in the act of 1898 that they had in the acts of 1841 and 1867.

In Collier on Bankruptcy (3d ed.), at page 199, it is said:

"The act of 1841 provided that 'debts created in consequence of a defalcation as a public officer or executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity' should not be released by a discharge. These terms have already been defined under prior acts, *and the decisions are applicable under the present act.*"

At page 209 the same author says:

"Whenever a debt is due by a testamentary trustee, executor, administrator, or guardian, as such, it is not released by a discharge. These are the 'technical trusts' referred to in the act of 1841, and uniformly held to create obligations not affected by a discharge. But the debt must be one due from the trustee, as such, not an individual indebtedness of his, even though connected with the trust estate. Thus a sum of money due from an executor to a legatee is a fiduciary debt, and is not released by his discharge in bankruptcy" (*In re* Crisfield, 55 Md., 192).

If, upon an accounting, a guardian, executor, administrator or express trustee is found to be indebted, in his fiduciary capacity, to his ward, beneficiary, or *cestui que trust*, and refuses, or fails to pay over, when properly required to do so, his discharge in bankruptcy does not release him from such indebtedness, whether the indebtedness had been created with an honest or a dishonest intent. In either case he is a defaulter. It has been uniformly held that obligations of that character are not affected by a discharge. Such has been the policy of all bankrupt laws with the exception of the bankruptcy act passed by Congress in 1800, and in which no debts were excepted in express terms. In no instance is a beneficiary or *cestui que trust* compelled to show fraud involving moral turpitude in order to bring a debt

due to him from an express trustee within the exceptions of the statute. Debts or liabilities created by defalcation arising from the mismanagement or unintentional wrongdoing of a trustee, are not barred by his discharge in bankruptcy; but if the clause in question applies to and limits the term "fraud," as counsel contend it does, then debts created by fraud in the administration of a trust estate are not barred unless the fraud involved moral turpitude. Counsel's construction leads to the absurdity of supposing that a *cestui que trust* or beneficiary would base his action upon the positive fraud of his trustee, when it would be sufficient to show simply a *defalcation*. It is quite obvious that the term "fraud" relates only to debts or liabilities which are not fiduciary in their character within the meaning of the law.

As the term "defalcation" is comprehensive enough to cover every official or fiduciary debt which an officer, or trustee, owes and refuses or fails to pay, the word "fraud" is entirely superfluous if subdivision 4, in which it is found, is confined or restricted to debts created in an official or fiduciary capacity; but if the word "fraud" be construed as applying to other than official or fiduciary debts and liabilities, as it was evidently intended it should be, we discover a substantial reason why it was used; we see that a purpose was thereby subserved, in accordance with the obvious policy of the statute, to except from the operation of a discharge debts and liabilities created by positive fraud involving moral turpitude, regardless of the capacity in which the debtor was acting at the time the fraud was committed. Such was the construction under the act of 1867.

In Frey *vs.* Torrey, 75 N. Y. Supp., 40, Justice Loughlin said:

"If the words 'fraud,' 'embezzlement,' and 'misappropriation' are all qualified by the clause, 'while acting as an officer or in any fiduciary capacity' it is difficult to see the purpose of the use of the word 'fraud' at all."

It is a canon of construction that no word in a statute shall be regarded as superfluous if a meaning not fully expressed by associate words can be ascribed to it. Every word of a statute is presumed to have been intended to have some force and effect; and no word in it is to be treated as unmeaning or superfluous, if a construction can be legitimately found which will preserve it and make it effectual.

Endlich on Interpretation of Statutes, secs. 23, 265, and cases cited.

In *Montclair vs. Ramsdell*, 107 U. S., 152, this court said :

"It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."

In Bishop on Stat. Crimes (3d ed.), sec. 82, the author says:

"Every word and clause should, if possible, have assigned to it a meaning, leaving no useless words."

In Opinion of the Justices, 22 Pick., 571, 575, Chief Justice Shaw said :

"But it is a sound rule of construction that every clause and word of a statute shall be presumed to have been intended to have some force and effect."

In *Commonwealth vs. McCaughey*, 9 Gray, 296, 297, Justice Metcalf said :

"For it is an anciently established rule in the interpretation of statutes, that such a sense is to be made upon the whole statute, that no clause, sentence or word shall prove superfluous, void or insignificant, if, by any other construction they may be made useful and pertinent (1 Show, 108; Bac. Ab. Stat., 1, 2)."

In Wilmot *vs.* Mudge, 106 U. S., 217, it is said, "that effect shall be given to all the words of a statute when this is possible without a conflict."

III.

Section 33, of the bankruptcy act of 1867, was substantially a re-enactment of the act of 1841, in that regard, with the additional provision that no debt created by fraud or embezzlement shall be discharged.

Section 1 of the bankruptcy act of 1841 contained the following provision:

"Debts which shall have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity," should be excepted from the operation of a discharge.

Section 33 of the bankruptcy act of 1867 (Rev. Stat., 5117) provided:

"That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

In *Noble vs. Hammond*, 129 U. S., 65, 69, Mr. Justice Lamar, in delivering the opinion of the court, said:

"Under sec. 5117 (sec. 33 act 1867), *which is substantially a re-enactment of the provision of the act of 1841* in this regard, with the single additional provision that 'no debt created by fraud shall be discharged,' etc., this court, on the line of the same reasoning, has construed the word 'fraud,'" etc.

IV.

The construction to be given to section 33 of the bankruptcy act of 1867 (Rev. Stat., sec. 5117), with reference to the release of a bankrupt from debts or claims created by his positive fraud, was determined by this court in the following cases: Strang vs. Bradner, 114 U. S., 555; Ames vs. Moir, 138 U. S., 306, and Forsyth vs. Vehmeyer, 177 U. S., 177. In those cases it was held that a discharge in bankruptcy did not release a bankrupt from debts or claims which were created by his positive fraud involving moral turpitude or intentional wrong, while not acting as an officer or in any fiduciary capacity at the time he committed the fraud.

In *Strang vs. Bradner, supra*, the special business of the appellees was to purchase wool, which they forwarded to appellants as commission merchants to sell on account. Appellees, for the accommodation of appellants, often furnished them with promissory notes for the purpose of enabling them to carry on business. By false and fraudulent representations that certain notes given by appellees in February had not been used, appellants obtained from appellees, in March, a new set of notes.

Mr. Justice Harlan, delivering the opinion of the court, said:

"The present suit, brought to recover a judgment for the amount plaintiffs were compelled to pay to *bona fide* holders of the March notes, proceeds upon the ground that the appellees have sustained damages by reason of the false and fraudulent representations made by Strang, on behalf of his

firm, whereby the appellees were induced to execute and deliver to that firm the four notes dated in March, 1875. Is this claim for damages of a class from which the bankrupts were relieved by their respective discharges in bankruptcy? * * * If Strang's conduct does not constitute positive fraud or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character. * * * It is therefore clear that whether the claim asserted by plaintiffs is regarded as one arising out of the deceit or fraud of the defendants, or as a debt created by fraud, the discharges in bankruptcy do not constitute a defense."

Ames vs. Moir, supra, was an action for fraud. Ames purchased from Moir 100 barrels of high wines, to be delivered to him upon call between certain dates, and to be paid for on delivery. Ames called for the high wines and got possession of them, when he knew himself to be insolvent, and with the intention not to pay for them. The evidence tended to show that he converted the wines to his own use without paying for them. It was held that he had committed positive fraud, involving moral turpitude, and that he was not released from the claim by his discharge in bankruptcy.

Forsyth vs. Vehmeyer, supra, was an action on a judgment recovered on a debt created by fraud. Forsyth falsely and fraudulently represented to Vehmeyer that he had on hand 200 cords of wood, which one Etheridge had contracted to purchase at $6 per cord. Forsyth had on hand only 40 cords of wood. By means of said false and fraudulent representations he obtained from Vehmeyer $200, which was to be repaid out of the proceeds of the sales of the wood. It was held, as stated in the syllabus:

"A representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of fraud involving moral turpitude and intentional wrong, and such debt is not discharged by a discharge in bankruptcy."

In *Noble vs. Hammond*, 129 U. S., 65, the court said:

"The effect to be given to the phrases 'while acting in a fiduciary character' and 'created by the fraud of the bankrupt' has been considered and fully settled by this court in the following cases: *Chapman v. Forsyth*, 2 How., 202; *Neal v. Clark*, 95 U. S., 704; *Wolf v. Stix*, 99 U. S., 1; *Hennequin v. Clews*, 111 U. S., 676; *Strang v. Bradner*, 114 U. S., 555; and *Palmer v. Hussey*, 119 U. S., 96. The class of debts held by the decisions in those cases to be excepted from the operation of bankrupt proceedings has been settled and illustrated with a clearness and fullness which leaves but little opening for any controversy with regard to the application of the clause under consideration to particular cases."

V.

Subdivision 4 of section 17 of the act of 1898, is substantially a re-enactment of a corresponding provision in the act of 1867, with the addition of the word "misappropriation."

For the purpose of comparison, we present, in parallel columns, section 17 of the act of 1898, and the provisions of section 33 of the act of 1867, which relate to debts excepted from the effect of a discharge:

Act of 1867.	Act of 1898.
Sec. 33. *And be it further enacted*, "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be	Sec. 17. Debts not Affected by a Discharge.—"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in

a payment on account of said debt."

Rev. Stat., section 5117: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

In Loveland on Bankruptcy, section 293, the author says:

"*A discharge in bankruptcy does not release a bankrupt from debts which were created by his fraud or embezzlement. This is substantially a re-enactment of the provision of the act of 1867 in this regard.*"

Section 295:

"*It will be observed that clause 4 of section 17 is substantially a re-enactment of the provisions of the act of 1867, with the addition of the word 'misappropriation.'*"

In Lowell on Bankruptcy (p. 395), the author says:

"Clause 4 is substantially the same as sec. 5117 of the Revised Statutes (formerly sec. 33 of the act of 1867), except that the word misappropriation is added."

In the case of *In re* Basch, 97 Fed. Rep., 761 (D. court, S. D. N. Y.), Judge Brown said:

"The provisions of section 17 (4) of the present bankrupt act as to the debts excepted from the operation of the discharge are so nearly identical with the language of the pre-

ceding acts that these provisions must be deemed to be used in the sense adjudicated by the above decisions, so as not to except a debt or claim for a technical conversion or sale on commission, like the claim of the present creditor."

Speaking of subdivision 4, Mr. Collier, in his work on Bankruptcy (3d ed.), at page 198, says:

"In most respects this provision is similar to the provision under the act of 1867, with the exception of the use of the word 'misappropriation' which does not appear in any former act."

In Frey *vs.* Torrey, 73 N. Y. Supp., 201–203 (October, 1901), Justice McAdam said:

"*And subdivision* 4 *of said section of the statute is, in substance, a re-enactment of the analogous provision of the former act.* Coll. Banks (3d ed.), 198."

In the same case, in the appellate division, 75 N. Y. Supp., p. 40 (March, 1902), the court said:

"It is true that the provisions with reference to a discharge in bankruptcy under the present law are somewhat different from those of the former act of Congress; but we think the change has *restricted* rather than extended the effect of a discharge."

At this point, we desire to call the attention of the court to the fact that the manifest trend of bankruptcy legislation has been to *restrict* rather than enlarge the effect of a discharge. It will be noticed that each successive bankruptcy act passed by Congress has increased the classes of debts which are excepted from the operation of a discharge. In the bankruptcy act of 1800, no debts were expressly excepted. The act of 1841 excepted—

"Debts which shall have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity."

The act of 1867 added to the class of debts which were excepted by the act of 1841, debts created by fraud or embezzlement. The act of 1898 added to the debts which were excepted by the act of 1867, debts created by misappropriation, and also the debts specified in subdivisions (1), (2), and (3) of section 17. The act of 1898 made a further addition to the classes of debts or liabilities which were not affected by a discharge, by omitting the provision contained in the act of 1867 allowing the assessment and proof of unliquidated damages for conversion. By referring to the amendments made in February, 1903, to the act of 1898, it will be seen that the classes of debts excepted from the effect of a discharge have been still further enlarged.

It will also be seen from the amendments that a discharge and release from any of his debts will be denied the bankrupt if he has committed any one of the various acts therein specified, and which, under the bankruptcy act of 1898, were not denounced or made a cause for the refusal of a discharge.

If it be true, as counsel for plaintiffs in error contend, that debts or liabilities created by the positive fraud or embezzlement of the bankrupt are barred by his discharge under the act of 1898, unless such debts or liabilities were incurred by him as an officer, or as an express trustee, then Congress *extended* rather than *restricted* the scope of a discharge by providing for the release of a *dishonest* bankrupt from liabilities created by his *fraud or crime.* This, we submit, Congress could not do without being chargeable with gross inconsistency and a reckless disregard of the plainest principles of justice and morality. A bankrupt law that could be used *as a shield for dishonesty, or a refuge for rascals, would be a reproach to the Congress that enacted it.*

Congress manifestly intended to except from the operation of a discharge the four classes of debts specified in subdivision 4 of section 17, namely: (1) debts created by fraud; (2) debts created by embezzlement; (3) debts created by misappropriation; and (4) debts created by the defalcation of an officer or express trustee.

VI.

When an act, or part of an act, which has received a judicial construction, is re-enacted in substantially the same terms, that construction must be considered to have the sanction of the legislature, unless the contrary appears. Mere change in the phraseology works no change in the established interpretation thereof, unless it clearly appears that such was the intention of the legislature.

In Black on Interpretation of Laws, 161, the author says:

"Where a statute has received a settled judicial construction, and is afterwards re-enacted by the same legislative power, in the same terms, or in *substantially the same language*, for the same purpose and object, it will be presumed that the legislature intended that the re-enacted law should have the same interpretation which was given to its original, and it will be construed accordingly, unless a contrary intention is very clearly shown. So also when terms or modes of expression are employed in a new statute, which had acquired a definite meaning and application in a previous statute on the same subject, or one analogous to it, they are generally supposed to be used in the same sense, and in settling the construction of the new statute regard should be had to the known and established interpretation of the former. Thus, in the federal bankruptcy act of 1841, it was provided that a discharge should not release debts which had been contracted by the bankrupt in a 'fiduciary capacity.'

"The same provision was repeated in the bankruptcy act of 1867, and it was held that these words were intended by Congress to bear, and should be construed by the courts to bear, *the same meaning which had been given to them by the judicial interpretations under the earlier law.*" (Cases cited in notes.)

In *Bradley vs. State*, 69 Ala., 318, Chief Justice Bricknell, delivering the opinion of the court, said:

"In the amendment, or revision, or in the re-enactment of statutes, changes of phraseology, the omission of words deemed superfluous, or the addition of words rendering the intention more clear, are not infrequent. The construction or operation of the statute is not varied because of such changes. Before the courts can pronounce that the law is changed, the legislative intention to change it must be evident. Language must be employed *which is not susceptible of any other construction.*"

In *Huddleston vs. Askey*, 56 Ala., 218, 220, it was said;

"In the adoption of the present statute the legislature is presumed to have known the construction the former statute received, and, so far as it was *substantially re-enacted*, to have adopted that construction. *Duramus v. Harrison*, 26 Ala., 326."

In *Posey vs. Pressly*, 60 Ala., 243, 249, it was said:

"It is obvious that, in the adoption of the present statute, the legislature had in view not only the former statute, but the judicial construction it had received. Whatever changes it was proposed to make, either in the statute or in its construction, are made in express terms and not left to inference."

In *McDonald vs. Hovey*, 110 U. S., 619, 628, Mr. Justice Bradley, delivering the opinion of the court, said:

"It is a received canon of construction, acquiesced in by this court—

"'That where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority.' *Pennock v. Dialogue*, 2 Pet., 1, 18; Smith's Commentaries on Stat. and Const. Law, § 634; Sedgwick on Construction of Stat. and Const. Law, 363.

"And even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. Chief Justice Green said:

"'Where two or more statutes, whose construction has been long settled, are consolidated into one, without any change of phraseology, the same construction ought to be put upon the consolidated act as was given to the original statutes. A different construction ought not to be adopted if thereby the policy of the act is subverted or its material provisions defeated.' *In re* Murphy, 3 Zab., 180.

"So, upon a revision of statutes, a different interpretation is not to be given to them without some *substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law.* Sedgwick on Const. Stat., 365. As said by the New York court for the correction of errors, in *Taylor v. Delaney*, 2 Caines Cas., 143, 150:

"'Where the law antecedently to the revision was settled, either by clear expression in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change.' And see Yates' Case, 4 Johns., 317; *Theriat v. Hart*, 2 Hill 380; *Parmelee v. Thompson*, 7 Hill 77; *Goodell v. Jackson*, 20 Johns., 693; *Croswell v. Crane*, 7 Barb., 191. 'The construction will not be changed by such alterations *as are merely designed to render the provisions more precise.*' *Mooers v. Bunker*, 29 N. H., 421.

"So the supreme court of Alabama has held that the legislature of that State in adopting the code, must be presumed to have known the judicial construction which had been placed on the former statutes; and, therefore, the re-enactment in the code of provisions *substantially* the same as those contained in a former statute *is a legislative adoption of their known judicial construction.* *Duramus v. Harrison*, 26 Ala., 326.

"'A change of phraseology in a revision will not be regarded as altering the laws where it had been well settled

by plain language in the statutes, or by judicial construction thereof, unless it is clear that such was the intent.' Sedgwick on Construction, 2d ed., 229, note."

In *Potter's Dwarris*, 181, note 2, it is said:

"An alteration in the phraseology, or the omission or addition of words in the revision of statutes, does not necessarily alter the construction of the act, or imply an intention to do so. Such intent must be evident, or the change in language palpable, before the courts will hold the construction to be changed. *Crowell v. Crane*, 7 Barb."

On page 274, note 4 (*id.*), it is said:

"Where the terms of a statute which has received judicial construction, are used in a later statute, whether passed by the legislature of the same State or country, or by that of another, that construction is to be given to the later statute. *Commonwealth v. Hartwell*, 3 Gray, 450; *Ruchmayboye v. Mottichmed*, 32 Eng. L. & Eq., 84; *Bogardus v. Trinity Church*, 4 Sand. Ch., 633; *Rigg v. Wilton*, 13 Ill., 15; *Adams v. Field*, 21 Vt., 256. It is to be presumed in such case that the legislature who passed the latter statute, knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law."

In *Bishop on Stat. Crimes*, the author says:

SEC. 75. "The court, knowing the present law, knows also its history and the prior law. Such prior law, the legislature, being presumed to know it, must have had in mind in enacting the statute, therefore in the construction the court should take it into account, and this is, in general, specially essential."

SEC. 82 (p. 77). "* * * The interpreter should consider and take into the account what was the law before which Coke says is '*the very lock and key to set open the windows of the statute.*'"

In Yates' Case, 4 Johns. (Law), 318, 358, Chief Justice Kent said:

"The act of 1787 (*habeas corpus* act) followed the English statute verbatim, and the revised act of 1807, made only

some slight abbreviations in the mode of expression, which cannot, without violence, be construed to alter, in the least degree, the sense and settled construction of the former act. That the 'mere change of phraseology' in the revised laws was not to work a change in the established interpretation, was the unanimous decision of the court for the correction of errors in 1805, in the case of *Taylor v. Delancy* (2 Caines Cases in Error, 150, 151)."

In *Dominick vs. Michael*, 4 Sandf., 13 N. Y., 374, 409, it is said:

"For nearly half a century it has been a cardinal and controlling maxim, that in the construction of a revised act, *a mere change in the language* shall not be regarded as evidence of an intention to vary the construction, unless the change is such as to render *that intention manifest and certain*. (Chief Justice Spencer in *Taylor v. Delancy*, 2 Caines Cases in Error, 151; Chancellor Kent in *Goodhill v. Jackson*, 20 Johnson, 722.) It was in the court of errors that a rule of interpretation so eminently judicious was first established, and although cases may have occurred in which it has been violated, it has certainly never been reversed or abandoned. It is now the rule, which, as judges, we are bound to follow, and we add that it is especially in the construction of the Revised Statutes, where the changes in phraseology are so frequent as to have changed entirely the outward form of the acts which are revised, that the observance of the rule is a necessary and paramount duty. Its abandonment or frequent violation would open a perennial source of confusion, uncertainty and litigation."

In "The Devonshire," 13 Fed. Rep., 39, it is said:

"Where a statute has received a judicial construction and is afterwards re-enacted by the legislature of the same or another country, it is presumed to have been passed as construed."

In *Reiche vs. Smythe*, 13 Wall., 162, it is said:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that

the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the later act, in the absence of anything to show a contrary intention."

In *Willis vs. Eastern Trust & Banking Co.*, 169 U. S., 295, 307, it is said:

"This provision, as incorporated in the act of Congress, *though somewhat condensed in form, is essentially in the same words and of precisely the same meaning, as the provision of the statute of Massachusetts.* While it omits the words 'the lessee of lands or tenements, or a person holding under such lessee,' it still, like the Massachusetts statute, in cases where there is neither forcible entry nor detainer, is restricted to cases in which 'the lease' has been determined, and differs in this respect from the provision in the first section of the act of Congress, which defines tenancies by suffrance.

"The resemblance between the provisions of the Massachusetts statute of 1860, and of the act of Congress of 1864, *is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction which those statutes had received in Massachusetts before the original enactment of the act of Congress must be considered as having been adopted by Congress with the text thus expounded.*"

In *Commonwealth vs. Hartnett*, 3 Gray, 450, Judge Metcalf, in the opinion, said:

"It is a common learning, that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act, which has been passed by the legislature of one State or country, is afterwards passed by the legislature of another. So when the legislature, in a later statute, use the terms of an earlier one which has received a judicial construction, that construction is to be given to the later statute. And this is manifestly right. For if it were intended to exclude any known construction of a previous statute, the legal presumption is, that its terms would be so

changed as to effect that intention. 6 Dane Ab., 613; *Kirkpatrick v. Gibson's Ex'ors*, 2 Brock., 388; *Pennock v. Dialogue*, 2 Pet., 18; *Adams v. Field*, 21 Vt., 286; *Whitcomb v. Rood*, 20 Vt., 52; *Rutland v. Mendon*, 1 Pick., 156; *Myrick v. Hasey*, 27 Maine, 17. * * * We are of the opinion that the purpose and intent of St. 1804, c. 143, sec. 6, and of the Rev. Sts., c. 126, sec. 14, were the same as the purpose and intent of St. 12 Anne, c. 7, and that they must have the same construction which was given to that before these were enacted."

In *State ex rel. vs. Cornell*, 75 Fed. Rep., 25, it is said:

"It has been frequently asserted that in case the legislature adopts the construction which it had already received by the highest courts of such State, and by a parity of reasoning, *where a law is re-enacted by a legislature, which has been interpreted by the supreme court of the same State such construction is thereby adopted.*"

VII.

A discharge in bankruptcy, under the act of 1898, does not release a bankrupt from debts created by his positive fraud involving moral turpitude or intentional wrong.

Section 17 of the bankruptcy act of 1898 is as follows:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Opposing counsel contend that a claim for damages arising from "frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another," is released by a discharge in bankruptcy, unless the claim is "merged in judgment." Section 17 of the bankruptcy act provides:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another."

If counsel's contention be sound, then the bankrupt has the power to nullify the provisions of subdivision (2), except as to judgments obtained before the commencement of proceedings in bankruptcy. This, we think, will be readily seen when the provisions of section 11*a* are considered. Section 11*a* is as follows:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

After a person has committed a fraud, or has obtained property by false and fraudulent representations, or has committed a willful and malicious injury to the person or property of another, and an action has been brought against him to recover damages resulting from such fraud or injury, then, all he need do, in order to escape from liability, if counsel's contention can be sustained, is to file a petition in bankruptcy, obtain a stay under the provisions of section 11*a* until he obtained his discharge, and then plead his dis-

charge as a bar to the claim. If a judgment should be entered after the filing of the petition it would be entered simply because the bankrupt did not avail himself of the provisions of section 11*a*. That this is, undoubtedly, also the view of counsel for plaintiff in error is shown by their statement that the "judgment, in order to be within the exception, must have been * * * perhaps, before the commencement of proceedings in bankruptcy."

It will be noted that in subdivision 2 of section 17 there is no limit as to the time within which the judgment must be obtained in order to bring it within the exception. A judgment in an action for fraud, etc., entered either before or after the proceeding in bankruptcy is commenced, is excepted from the operation of a discharge. Now can it be supposed that Congress intended to allow "actions for frauds or obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another" to be stayed until the bankrupt could obtain his discharge, and to make such discharge a bar to the action? Is it supposable that it was the intention of Congress to put it in the power of the bankrupt to thus render the provisions of subdivision 2 practically inoperative? Our views as to the results which would follow from counsel's contention find confirmation in the methods adopted by plaintiffs in error in the case at bar, if the statement of their counsel is to be taken as true. They say (p. 70): "It appears that an order of stay was granted by the Federal court in the case at bar." If that be true, then the plaintiffs in error obtained a stay with the view of preventing the defendant in error from obtaining a judgment until after they had obtained their discharge. Counsel further say:

"Inferentially, it (the stay) must have been granted upon the theory that the demand of the defendant in error is one from which a discharge would be a release."

But why say "inferentially"? If they obtained a stay they surely know on what "theory" it was granted, and they should have stated what that theory was, instead of stating their inference as to what it was. Counsel's statement justifies the conclusion that they attempted to obtain a stay under the provisions of section 11. We may, however, say here that there is not a word in the record to show "that an order of stay was *granted* by the Federal court." If one was granted, the plaintiff in error was not served with notice, nor did he know, that an application for a stay would be made. To have obtained a stay without his knowledge, or without giving him an opportunity to be heard, might be termed "sharp practice," *if not something worse*, although in the case at bar it might have been expected, because consistent. Then again, if a stay was granted it could not have been granted on counsel's "theory," because Judge Kohlsaat distinctly held in the case of *In re* Wollock, 120 Fed. Rep., 516, to which we will refer later on, *that a debt or claim created by positive fraud is not barred by a discharge in bankruptcy.*

In re Thomas (U. S. district court, Iowa, April, 1899), 92 Fed. Rep., 912, was an application of a bankrupt for his discharge. A creditor filed specification of grounds in opposition to the discharge.

Woolson, district judge, said:

"That the debt was created by *fraud* of the bankrupt, if such be the case, is not ground for refusal of discharge under the statute. Section 17 provides that from *debts so created a discharge does not release the bankrupt.* And when the discharge is pleaded as a defense to the enforcement of such debt, proof that the *debt was so created* makes the discharge inoperative against it. But the statute does not justify withholding the discharge therefor. Collier in his excellent treatise on Bankruptcy, says (page 135, 1st ed.): * * * 'The mere fact that the only debt is one which the discharge will not affect—for instance, that it was due from the debtor in a fiduciary capacity, *or was created by his fraud*—is no

reason for refusing the discharge. The question how the discharge affects particular debts is to be determined by the court in which the bankrupt may be sued upon the debt, should the bankrupt in that suit interpose the discharge as a defense.'"

In the case *In re Blumberg*, 1st Am. B. R., page 633 (March, 1899, U. S. district court, Tenn.), Judge Clark, referring to section 17 of the bankruptcy act of 1898, said:

"It is not doubted that the purpose of this statute *is the same as a similar provision found in the former bankruptcy law*, and that the word fraud means moral turpitude or intentional wrong, and that *a part of the purpose of the statute was to discourage and punish such moral turpitude or intentional wrong.* There is, of course, a difference in the phraseology between the former and the present statute, the former law designating the debt as one created by fraud or embezzlement, etc., while, as will be observed, the language of the present act is 'judgments in actions for fraud, etc.' Under the original bankruptcy law it was not, and could not be doubted that the debt which could not be discharged was one based upon the fraud and the injury resulting from such fraud, the fraud itself being the foundation of the right and of the recovery, if a recovery was had. *In my opinion there is nothing in the present statute to warrant the conclusion that any different meaning is to be attached to the language used.*"

In re Black, 97 Fed. Rep., 493 (dist. court, N. D. California, Nov., 1899), De Haven, district judge, said:

"The bankruptcy act provides (section 17) that a discharge *shall not affect any debt created by the fraud of the bankrupt*, but the question whether there was fraud in the creation of any particular debt is one which the court of bankruptcy is not authorized to adjudicate in passing upon the bankrupt's application for discharge. That question is one which can only be determined in an action by the creditor for the recovery of such debt when the discharge in bankruptcy is pleaded in bar. In such an action and in answer to such a plea, the creditor would have the right to show that the debt sued for *was created by fraud*, and *therefore not affected by the discharge*. *In re Thomas* (D. C.), 92 Fed., 912."

In re Basch, 97 Fed. R., 761 (November, 1899, D. court, S. D. N. Y.), application for stay of proceedings in State court, Brown, district judge, said:

"The provision of section 17 (4) of the present bankruptcy act as to the debts excepted from the operation of the discharge, *are so nearly identical with the language of the preceding acts*, that these provisions must be deemed to be used in the sense adjudicated by the above decisions, so as not to except a debt or claim for a technical conversion or sale on commission, like the claim of the present creditor."

In re Lewensohn (U. S. dist. court N. Y., Jan., 1900), 99 Fed. Rep., 73 (cited by plaintiff in error), was an application for a stay of proceedings on *warrants which had been issued for his arrest* in an action brought against him in the State court for obtaining goods by false pretenses.

Brown, J., said:

"2. *Nor is there any doubt that if the charges of false representations are sustained, these debts would be barred from the operation of the discharge by subdivision 2 of section 17, or by subdivision 4 of the bankruptcy act.* * * * If a judgment is necessary to prevent the discharge from barring the debt, a prosecution of the suit to judgment should be allowed; since *the essential nature of the claim, if the charges of false representation are sustained, makes it one which evidently was not designed to be barred.*"

In the case *In re* Steed (D. C. North Carolina, April, 1901) 107 Fed. Rep., 682, 684, Judge Purnell said:

"*If the debt is created by fraud, the bankrupt is not discharged therefrom.* Section 17, cl. 4."

In Loveland on Bankruptcy, it is said:

"SEC. 293. *A discharge in bankruptcy does not release a bankrupt from debts which were created by his fraud or embezzlement. This is substantially a re-enactment of the provision of the act of 1867 in this regard.* The effect to oe given to this phrase was considered and fully settled by the su-

preme court in cases arising under the former act. * * * Where the claim is for damages on account of actual fraud or deceit, practiced by the debtor, the claim is not barred by a discharge" (*Strang v. Bradner*, 114 U. S., 555; *Ames v. Moir*, 138 U. S., 306; *Hughes v. Oliver*, 8 Pa. St., 426; *Morse v. Hutchins*, 102 Mass., 439; *Stokes v. Mason*, 10 R. I., 261).

"A debt is not barred by a discharge where goods are purchased with the intention of never paying for them, or by fraudulent representations at the time" (*Stewart v. Emerson*, 52 N. H., 301; *In re Devoe*, 1 Lowell, 251).

"SEC. 295. It will be observed that *clause 4 of section 17 is substantially a re-enactment of the provision of the act of 1867, with the addition of the word 'misappropriation.'*"

Judge Lowell, in his work on Bankruptcy, says:

"SEC. 433. *The recent statutes except from the operation of the discharge, debts which have been fraudulently 'created' or 'incurred;'* the former word was used in our statute of 1867, and the latter in the English laws of 1869 and 1893."

On page 488 the author says:

"It is incredible that Congress should intend to release the debtor from liability for a tort, but not from liability on a judgment for tort."

In Collier on Bankruptcy (3d ed.), 200, it is said:

"See *Forsyth v. Vehmeyer*, decided by the Supreme Court, April, 1900, 3 Am. B. R., 807; 177 U. S., 177, which, while having reference to the statute of 1867, *is also equally applicable to the present statute.* In that case it was held that a representation as to an act made knowingly, falsely, and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong, and is non-dischargeable."

Again, at page 202, the author says:

"*Under the provisions of section 17, subdivision (4), a debt created by fraud is not released.*"

At page 345 the author says (1st ed.):

"We think it will be conceded that there is in principle no more reason for releasing a tort feasor from the amount due to another as damages, when it has been liquidated by some special mode of assessment, than when it has been liquidated by a judgment. The reason for making a discharge in bankruptcy no release of a judgment in an action for any of the torts mentioned in section 17 (2) is because of the nature of the debt—because of the element of wrong existing in it—and not because that claim has been put into the form of a judgment."

The case of Bracken *vs.* Milner (U. S. circuit court, Mo., Oct., 1900), 104 Fed. R., 522, was so thoroughly considered that we feel justified in quoting from the opinion quite at length. The 3d syllabus is as follows:

Syll. 3. "Bankruptcy—Debt created by fraud.—An agent intrusted with money of his principals to be loaned on real estate security made such a loan, taking as security a trust deed to his partner as trustee. This deed he afterwards caused to be foreclosed, and bid in the property in his own name, but without paying therefor, and received a deed from the trustee. He made no report of the transaction to his principals, but subsequently conveyed the property away, and retained the proceeds. *Held*, that the transaction was outside of and in violation of his agency, and his liability to his principals resulting therefrom was a debt created by fraud, within the meaning of bankr. act 1898, sec. 17, subd. 4, from which he was not released by a discharge in bankruptcy."

In the opinion delivered by Judge Phillips he said:

"The plaintiffs for many years past were resident citizens of the State of Ohio. They had known the defendant from his boyhood, and had the utmost confidence in his personal integrity and business capacity. Shortly after the civil war he located in the city of Springfield, Mo., and plaintiffs, who were partners in the mercantile business, and J. P. Bracken in his individual capacity, made arrangements with the defendant to loan money for them in Southwest Missouri, secured

by mortgages or deeds of trust on real estate. The defendant was to loan at given rates of interest, and report the description and quality of the land tendered as security to the plaintiffs for their approval. The notes taken for loans were to be executed to the plaintiffs, or whichever of them was making the loan, and the notes and deeds of trust were to be sent by defendant to them. The defendant was to look to the borrowers alone for his commission for services. He was to collect the annual interest for the plaintiffs, and look after the securities and the collections, and remit promptly to the plaintiffs all collections. Beginning back in the 80's plaintiffs sent him money under this arrangement, which they continued to do until some time early in the 90's. In some of the deeds of trust taken by the defendant his name was inserted as trustee, and in some of the loans made by him for plaintiffs other persons were made trustees in the deeds of trust. Beginning perhaps as far back as 1884, payments of annual interest due under the loans were not paid promptly, according to the defendant's reports by letter to the plaintiffs. These delinquencies increased as time wore on, and upon inquiries made by plaintiffs of the defendant as to the cause thereof, he wrote them various excuses and explanations, making them occasional remittances to quiet their importunities. But matters grew worse, until in 1894 and 1895 the defendant almost ceased to make any replies to plaintiffs' repeated inquiries of him; and in June, 1895, one of the plaintiffs went to Springfield, Mo., to investigate these matters. After pressing the defendant for explanations for two or three days, he admitted that he had collected the moneys sued for in these actions at various times prior thereto, and had appropriated the same to his own use in private transactions, with the expectation that some favorable turn would take place in his fortunes which would enable him to make restitution. * * *

"Prior to the institution of these suits, the defendant, Milner, on his voluntary petition, was adjudged a bankrupt. He reported these claims sued on in his schedules as among his liabilities. Having received his final discharge in bankruptcy, he pleaded the same as a release from the claims sued on. He also interposes the plea of the statute of limitations."

"The controlling question in this case is the effect of the discharge in bankruptcy on the claims sued for, and involves

the construction of *subdivision* 4, sec. 17, bankr. act, which declares that a 'discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.' The conduct of the defendant in respect to his stewardship is so reprehensible that at the hearing of this case the inclination of my mind was to hold him liable on all of these claims. But an examination of the rulings of the supreme court on kindred statutes has unsettled these first impressions. The question turns upon the proper construction of the words 'defalcation while acting in any fiduciary capacity.'"

After reviewing the authorities, Judge Phillips said:

"Applying these authoritative principles to this case, what was the character of Milner in respect to his default in failing to remit the moneys collected by him in those cases, where the collections *were not made under foreclosure of the deeds of trust in which he was trustee?* In such case his authority to collect did not arise from any provisions or recitations in the deeds of trust, but simply by virtue of his agency under the contract to collect the interest and principal, and remit the same to the plaintiffs. Was there any more special trust and confidence reposed in him than that reposed by any principal in the agent selected to take his money for investment in approved securities, look after the same, and attend to the collections for him? He was simply under contract obligation to remit as fast as collected. The defendant did not misapply the money sent him. He loaned it on approved securities. His default arose *on failure to remit*, as a mere *agent*, in some of the cases sued on. The court, therefore, holds that in respect of the collections made by the defendant *independently of his trusteeship* in the deed of trust, and in the absence of *positive fraud* his liability therefor is released by his discharge in bankruptcy.

"A different question arises in the instance where the defendant was trustee in some of the deeds of trust, which he of his own motion foreclosed, and appropriated the money arising from the sales. He did not report to plaintiffs, or either of them, the facts of such sales and the receipt of the money arising therefrom. On the contrary, he concealed

these facts from the beneficiaries in the deeds of trust, and led them, by his letters, to believe that the debtors were delinquent, and the deeds of trust were in force. He had himself made trustee in certain of the deeds of trust, and thereby accepted the office. As such he was trustee of an *express trust*, and was therefore acting under a *technical trust* created by an instrument of writing. His duties as such trustee were clearly defined by the instrument, which empowered him to sell the mortgaged premises, in case of default, to the highest bidder, for cash at public vendue; and on the payment of the purchase money he was to 'receive the proceeds of sale, out of which shall be paid, first, the cost and expenses of this trust, and next, all amounts expended as aforesaid, for taxes and other purposes, with interest as above mentioned, and next, the amount that may remain unpaid on said note and interest thereon; * * * and the said party of the second part (the defendant) covenants faithfully to perform and fulfill the trust herein created.' He received the money under the foreclosure sales as a *technical trustee*, and was bound by his office as such to pay over to the *cestui que trust*, 'the amount that may remain unpaid on said note.' In other words, he received such money while acting, in the strictest sense, *in a 'fiduciary capacity.'* His liability, therefore, on these causes of action is not released by his discharge in bankruptcy. In this category are the collections made by him under the deeds of trust given by Giles P. Newbill and George B. Ramsay. While he was trustee under the deed of trust given by Jeffries, his collection of the debt thereby secured was not as trustee by foreclosure. It was paid to him voluntarily by Jeffries as the recognized agent of the plaintiffs, and therefore comes within the class of cases first discussed in this opinion.

"A *different question* is presented in respect of what is known as the Neighbors' transaction. On February 16, 1881, the defendant loaned for the two Brackens the sum of $550 to W. D. Neighbors, secured by a deed of trust on real estate, executed to John W. Lisenby as trustee. This deed of trust he caused to be foreclosed by the trustee, and at the sale thereunder, on the 28th day of July, 1882, he bid in the land in his own name at $500. But for some unexplained reason the trustee's deed was not made to him until the 23d day of February, 1889. There is no pretense that the defendant paid the $500 to the trustee. *This dealing he never*

reported to plaintiffs, but persistently kept the fact concealed from them, and led them to believe that the deed of trust continued in force until the visit of one of the plaintiffs, in June, 1885, when he stated that he had 'traded the land off' in 1887 or 1888. What he got in exchange does not appear. This transaction was clearly *outside of his agency.* Conceding that it was permissible, for properly guarding the interests of his principals to bid the land in at trustee's sale, he should have done so in their name, and had the deed made to them; or having bidden it in in his own name, *he should have reported the transaction to plaintiffs,* and sent them the $500, subject to their approval. This whole transaction is further characterized by the fact that Lisenby, trustee in the deeds of trust, was at the time the defendant's partner in business. Therefore, the transaction stands in its *moral* aspects little different from its *legal* effect had the defendant's own name been inserted as trustee. The result is that plaintiffs lost their security and the money. The thing, whatever it was, he got in exchange for the land, is gone, so that the plaintiffs are unable to fix upon it an equitable lien. *The property did not come into his hands as agent, but in violation of his duty as agent.* The whole manner of depriving plaintiffs of their security and money was *mala fides,* a *gross and positive fraud, within the meaning of the term 'fraud' employed in section 17, subd. 4, of the bankrupt act,* and defendant's liability for damages resulting therefrom is *not released by his discharge in bankruptcy.*

"In respect of the statute of limitations pleaded by defendant in those actions, it is sufficient to say that under section 4290, Rev. St. Mo., 1899, it is provided that 'if any person, by absconding or concealing himself, or by any other improper act prevent the commencement of an action, such action may be commenced within the time herein limited after the commencement of such action shall have ceased to be so prevented.' As already shown, this defendant did not only conceal from the plaintiffs the fact of his having collected this money while they were residing in a distant State, but by his letters and whole conduct he purposely led them to believe that the debts had not been collected or the mortgages foreclosed. In such case the plaintiffs had five years in which to bring the action after the discovery of the fraud. The discovery was not made until June, 1895, and the suits were brought in March, 1900. * * *

"Judgment will go against the defendant for the amount of the *defalcation* on the Ramsay and Newbill debts, and for the *balance* due on the Neighbors' debt, after allowing a proper credit for the Arkansas land."

In the above case there were three classes of claims against the defendant.

1. Claims arising out of transactions in which the defendant was *trustee of an express trust*. As this was a *technical trust*, within the meaning of the bankruptcy act, thedefendant's discharge in bankruptcy did not release him.

2. Claims for money which the defendant received, simply as the agent of the plaintiff, and which he had failed to remit. Following the decisions rendered under the act of 1867, in cases of like character, the court held that as to those claims the defendant's discharge was a release.

3. A claim arising out of a transaction (the Neighbor's transaction) in which the defendant was not acting as the *trustee of an express trust*. The court held that the facts and circumstances connected with the transaction showed that the defendant's conduct "was *mala fides, a gross and positive fraud*, within *the meaning of the term 'fraud' employed in section 17, subd. 4, of the bankrupt act*," and that therefore his discharge was not a release of the claim.

Milner was guilty of fraudulent concealment, of making false and fraudulent representations, and of fraudulently appropriating the property of another to his own use. The defendants in the case at bar were *repeatedly* guilty of acts of a like character, from the consequences of which they are now seeking refuge under a law which was enacted for the relief of the "*honest* but unfortunate debtor."

In re Cole, 106 Fed. R., 837 (district court N. Y., March, 1901), was an application to stay proceedings in an action

brought against the bankrupt in the State court. In the course of the opinion Judge Hazel said:

"This is an application to stay proceedings in an action brought against the bankrupt in the supreme court of the State of New York. The pleadings in that action come before me as part of the motion papers. It is admitted on argument that the action is brought *to recover damages for an alleged fraud.* It also appears that the action is now on the day calendar of the supreme court of this State at Buffalo, and plaintiff is pressing a trial. The petitioner was adjudicated bankrupt on his own petition on the 8th day of March, 1901, after the action now sought to be stayed was on the calendar of the court for trial. The schedule of the bankrupt lists the claim of the plaintiff in the pending action for fraud, and refers thereto as 'an alleged claim against petitioner and others, growing out of transactions in real estate, which said claim is unliquidated, and is contested by petitioner.' It is claimed by the plaintiff in her complaint that the bankrupt has, by fraudulent representations, defrauded her out of certain real estate in the complaint described, to her damage of $8,000. If plaintiff is permitted to proceed, and is successful in securing a judgment, it is clear that her judgment would not be dischargeable in bankruptcy under Bankr. act, sec. 17, subsec. 2. It is strongly urged that the claim as set out in the schedule is provable, and is not within the exceptions mentioned in section 17, and that it may be liquidated by order of this court as provided by section 63*b*; that this claim or debt is as yet simply a cause of action, if anything, and, not having been reduced to judgment, could be proved and is dischargeable in bankruptcy. I have examined *In re Rhutasel* (D. C.), 96 Fed., 597, and other authorities cited by counsel, *but I am unable to convince myself that Congress intended that a claim of this nature—one arising from the fraud of the bankrupt—is dischargeable in bankruptcy, when concededly a judgment for a claim of this character is not released by a discharge.* I am disposed to agree with the opinion of Judge Brown, as expressed *In re Lewensohn* (D. C.), 99 Fed., 73: 'If a judgment *is necessary* to prevent discharge from barring the debt, a prosecution of the suit to judgment should be allowed, since *the essential nature of the claim, if the charges of false representation are sustained, makes it one which evidently was not designed to be barred.*' The case of

Burnham v. Pidcock, 5 Am. Bankr. R., 42, 66 N. Y. Supp., 806, and the views therein expressed, do not seem at variance with this determination. In that case the claim sought to be exempted from the operation of the discharge was upon a *judgment* obtained in an action for conversion, and the court said that it is not necessarily one rendered in an action either for fraud or wilful and malicious injuries to the person or property of another, within the meaning of the act."

Frey *vs.* Torrey, 73 N. Y. Supplement, 201, was decided at the appellate term of the supreme court in October, 1901. The opinions delivered in the case are as follows:

"GILDERSLEEVE, *J.*:

"The action is brought to recover the amount deposited by the plaintiff with the defendant, who was a private banker, which deposit was, according to the plaintiff, received by the said banker, although the latter knew he was insolvent at the time of receiving such deposit. The answer is a general denial and a discharge in bankruptcy. The justice gave judgment for the plaintiff for $162.05 damages and costs. The defendant appeals.

"The defendant was a private banker, with whom plaintiff had been making deposits for more than a year. His last deposit was on October 11, 1898. On October 4, 1898, the plaintiff's total balance with defendant was $1.19, but on October 5th, 6th, 7th, 10th, and 11th he deposited sums aggregating $150. However, during the aforesaid days of October, 1898, he withdrew sums aggregating $28, so that at the close of business on October 11th he had a balance of $123.19, of which $122 had been deposited by the plaintiff and received by the defendant as such private banker. Subsequently, on October 4, 1898, other checks were drawn by the plaintiff on the defendant on October 10th, and payment refused, although the amounts were within the limit of the plaintiff's balance with the defendant. No part of the balance of $123.19 has been paid by the defendant, although duly demanded. On October 13, 1898, the defendant made a general assignment for the benefit of creditors. The assignee only succeeded in collecting about $600 of assets. The plaintiff introduced considerable evidence, both documentary and oral, tending to show that defendant was insolvent

at the time that said deposits were made, and that he accepted them with full knowledge of his own insolvency, while carefully concealing the fact from the plaintiff. There is much dispute as to the facts, but there is sufficient evidence to uphold the finding of the justice in the plaintiff's favor. By accepting such deposits, under the circumstances disclosed, the defendant was guilty of fraud. *Cassidy v. Uhlmann*, 54 App. Div., 208; 66 N. Y. Supp., 670; *Cragie vs. Hadley*, 99 N. Y., 135; 1 N. E., 537; 52 Am. Rep., 9; *Blair vs. Hill*, 90 App. Div., 33; 63 N. Y. Supp., 670. *His discharge in bankruptcy did not relieve him from a debt founded on fraud. Bankr. act, § 17, subd. 4.* Nor, by proving his claim against the defendant in the bankruptcy proceeding, did the plaintiff waive his right to bring this action. *Ewart v. Schwartz*, 48 N. Y. Super. Ct., 390; *Stokes v. Mason*, 10 R. I., 261. The numerous authorities cited by the defendant's counsel do not seem to apply to the circumstances of the case at bar.

"The judgment, upon the whole case, should be affirmed, with costs.

"Freedman, P. J., concurs.

"McAdam, J. (concurring). Although a literal reading of subdivision 4 of section 17 of the bankruptcy law causes a doubt to arise as to whether debts created by the fraud of a bankrupt who is not an officer or one acting in a fiduciary capacity are unaffected by his discharge (*In re* Lewensohn [D. C.] 3 Am. Bankr. R., 596, 99 Fed., 73), a careful reading of that subdivision in the light of former bankruptcy acts indicates that such debts are not affected by a discharge in bankruptcy. A reference to the former statutes is instructive as showing the development of the scheme of exemption from the operation of the law. There was no express provision for exemption in the act of 1800 (2 Stat., 19). By the act of 1841, § 1 (5 Stat., 440), the debts not released by a discharge were 'debts created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any fiduciary capacity.' The act of 1867 (14 Stat., p. 533, § 33) provided:

"'No debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividends thereon shall be a payment on account of said debt.'

"It will be noticed that the last-mentioned statute adds

fraud or embezzlement of the bankrupt, who may not be a public officer or occupy a fiduciary relation, to the cases provided for by the act of 1841.

"That part of the present act devoted to exemptions (section 17) not only provides for cases of fraud, but for other torts (subdivisions 2, 4), and also makes the discharge inoperative as to taxes (subdivision 1), and as to claims not scheduled in time, unless the creditor had actual knowledge or notice of the proceedings in bankruptcy. Under the act of 1867 doubts arose whether a judgment for fraud by merger of the original debt did not make the bankrupt's discharge operative upon the debt. *In re* Lewensohn, *supra*. Apparently to dispel such doubts, subdivision 2 of section 17 of the present statute was enacted, providing that the bankrupt's discharge shall not release him from provable debts which are 'judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another.' And subdivision 4 of said section of the statute is, in substance, a re-enactment of the analogous provision of the former act. Coll. Bankr. (3d ed.) 198. It appears to have been the legislative intent to prevent bankruptcy from being interposed as a shield against fraud, irrespective of the fact whether the creditor has obtained a judgment for the fraud or not.

"Judgment affirmed, with costs."

Frey vs. Torrey, 75 N. Y. Supplement, p. 40 (appeal from the Appellate Term to the Appellate Division Supreme Court), was decided March 7, 1902. It is apparent that the case was carefully considered. In a well reasoned opinion, fully supported by the authorities cited, Laughlin, J., said:

"The pleadings in the municipal court were oral. The record shows that the complaint was 'for money obtained by fraud.' The answer was a general denial and a plea of discharge in bankruptcy. The defendant was a private banker, and between the 5th and 11th days of October, 1898, the plaintiff deposited with him the sum of $150. The balance of this deposit standing to the credit of the plaintiff on the last-mentioned date was $123.19, no part of which has been paid. The action was brought to recover that sum,

On the 13th day of October, 1898, the defendant made a general assignment for the benefit of his creditors, which was filed the next day; and on the 17th day of December thereafter, on the petition of his creditors, he was duly adjudged a bankrupt by the United States district court. In the bankruptcy proceedings the plaintiff filed proof of a claim in the said amount 'for money deposited' with the defendant 'while acting in the capacity of banker.' On the 29th day of March, 1899, the defendant was duly discharged by said court from all debts provable in bankruptcy which existed on the day he was adjudged a bankrupt, 'excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.'

"The appellant, without conceding fraud on his part in contracting this indebtedness, rests his appeal solely upon the grounds: (1) That respondent, having proved his debt upon contract, waived his right to recover upon the ground of fraud; and (2) that, even if there was actual fraud on his part, still the debt has been discharged by the discharge in bankruptcy. The trial court and the appellate term have determined that there was fraud on the part of appellant in receiving these deposits when he was hopelessly insolvent. We do not deem it necessary, inasmuch as the appellant has not seen fit to present the point, to scrutinize the evidence, in the light of the decisions applicable, for the purpose of determining whether a finding that positive fraud, involving moral turpitude or intentional wrong, might be inferred therefrom. The effect of the discharge in bankruptcy must be determined by a consideration of the bankruptcy act of July 1, 1898, and the decisions thereunder, and those construing the corresponding provisions of the former bankruptcy laws. Section 17 of the present bankruptcy law, so far as material to our inquiry, provides as follows:

"'A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.' 30 Stat., 550.

"The provisions of the bankruptcy act of 1867 corresponding with the two subdivisions quoted, so far as that act con-

tained provisions on the subject, were embraced in section 33 of the act of 1867, which is the same as section 5117 of the United States Revised Statutes, which provided as follows:

"'No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy.'

"The appellant contends that the words 'while acting as an officer or in any fiduciary capacity,' in subdivision 4 of section 17 of the act of 1898, related not only to 'defalcation,' but also to the words 'fraud,' 'embezzlement,' and 'misappropriation.' In other words, he contends that debts created by fraud are not necessarily dischargeable in bankruptcy, but that the fraud must have occurred while the defendant was acting as an officer or in some fiduciary capacity. This was neither the grammatical nor judicial construction of section 5117 of the United States Revised Statutes. *Sheldon v. Clews*, 13 Abb. N. C., 41; *Bradner v. Strang*, 89 N. Y., 299, affirmed in *Strang v. Bradner*, 114 U. S., 555, 5 Sup. Ct. 1039, 29 L. Ed. 248; *Schroeder v. Frey*, 60 Hun, 58, 14 N. Y. Supp., 71, affirmed in 114 N. Y., 209, 21 N. E., 119; *Stokes v. Mason*, 10 R. I., 261; Brandon, Bankr. (2d ed.), 272.

"The construction of subdivision 4 herein quoted has been frequently discussed judicially, but we find no controlling precedent. The view presented by appellant seems to have been adopted by the appellate division in the fourth department *In re* Bullis (73 N. Y. Supp., 1047), but the construction of subdivision 4 was not essential to the decision in that case. The question there was whether a judgment had been discharged by a discharge in bankruptcy of the judgment debtor, and the point decided was that the judgment had been recovered in an action for fraud, and therefore was excepted from the operation of such discharge by subdivision 2 of said section 17. It is true that the provisions with reference to a discharge in bankruptcy under the present law are somewhat different from those of the former act of Congress; but we think the change has restricted rather than extended the effect of a discharge. Subdivision 2 of section 17 excepts from the discharge judgments for willful and malicious injuries to the property of another. There was no similar exception in the former statute. Under the construction of the former bankruptcy

law, causes of action against factors, agents, commission merchants, bailees, and auctioneers for conversion or misappropriation of funds of property were discharged, it being held that the debts for fraud not dischargeable were those where there was actual positive fraud as distinguished from implied or constructive fraud, and that the debts created by defalcation, while acting in a fiduciary character, embraced, only those debts incurred by a breach of a technical, as distinguished from an implied, trust (*Lawrence v. Harrington*, 122 N. Y., 408, 25 N. E., 406; *Mulock v. Byrnes*, 129 N. Y., 23 29 N. E., 244; *Hennequin v. Clews*, 77 N. Y., 427, affirmed in 111 U. S., 676, 4 Sup. Ct. 576, 28 L. Ed. 565; *Neal v. Clark*, 95 U. S., 704, 24 L. Ed., 586; *Upshur v. Briscoe*, 138 U. S., 365, 11 Sup. Ct., 313, 34 L. Ed., 931; Loveland, Bankr. § 295). In view of these decisions, we regard the addition of the word 'misappropriation,' inserted in subdivision 4 of section 17 of the act of 1898, which was not in the former act, as quite significant, and as designed to except from the discharge the classes of debts last referred to which were discharged under the former bankruptcy law. It will also be observed that the word 'public,' qualifying 'officer,' in the former statute, has been omitted from the act of 1898.

"It seems to be the view of the text writers and of the Federal judges, so far as this question has been considered, that Congress in this change of phraseology intended no change whatever with reference to the character of the debts created by fraud, which are not dischargeable (Coll. Bankr. (3d ed.), pp. 198, 199; Loveland, Bankr., §§ 293, 295; *In re* Thomas, 1 Am. Bankr. R., 515, 92 Fed., 912; *In re* Moreau Lieber, 3 Am. Bankr. R., 217. If the words 'fraud,' 'embezzlement,' and 'misappropriation' are all qualified by the clause, 'while acting as an officer or in any fiduciary capacity,' it is difficult to see the purpose of the use of the word 'fraud' at all.

"The respondent's claim not having been merged in a judgment, subdivision 2 of section 17, hereinbefore quoted, has no application, and we do not think that that subdivision tends to sustain the appellant's contention. It will be observed that there was no corresponding provision under the former law expressly exempting from the discharge causes of action for fraud that had merged in judgments. There appears to have been some doubt whether such judgments would remain enforceable, and, in view of the fact

that Congress provides in subdivisions 1 and 5 of section 63 for proving judgments as debts, this subdivision was doubtless enacted to obviate such question, as well as to provide for cases, as has been seen, that were neither covered by the former law nor included in subdivision 4 of the present act. *In re* Lewensohn, 3 Am. Bankr. R., 594–596, 99 Fed., 73; Coll. Bankr. (3d ed.), p. 194.

"The application of subdivision 4, relating to debts not in judgments, depends on how the debts were created; while the application of subdivision 2, which is confined to debts merged in judgments, depends, not on how the debts were originally created but on the form of action on which the recovery was had, as shown by the judgments, pleadings, and record. *In re* Rhutassel (D. C.), 96 Fed., 597; *In re* Thomas, 1 Am. Bankr. R., 515, 92 Fed., 912; *Burnham v. Pidcock*, 58 App. Div., 273, 68 N. Y. Supp., 1007; *In re* Bullis, *supra*; Coll. Bankr. (3d ed.), p. 194. We are of the opinion, therefore, that this indebtedness, having been created by the fraud of the appellant, was not discharged by the decree in bankruptcy."

An appeal was taken by permission from the judgment of the appellate division to the court of appeals (Frey *vs.* Torrey, 175 N. Y., 501; 67 N. E. Rep., 1082; court of appeals of New York June 9, 1903):

"Appeal by permission from a judgment of the appellate division of the supreme court in the first judicial department entered March 22, 1902, which affirmed a determination of the appellate term affirming a judgment of the municipal court of the city of New York in favor of plaintiff * * *

"Second question certified: Under subdivision 4 of section 17 of said act, does a discharge in bankruptcy under said act release the bankrupt from a debt which was created by his fraud, *but not while acting as an officer or in any fiduciary capacity*, where such debt has not been reduced to, or merged in a judgment? *Per curiam:* Judgment (70 App. Div., 175; N. Y. Supp., 40) affirmed with costs, on prevailing opinion below. Both questions certified answered in the negative. Parker, C. J., and Gray, O'Brien, Bartlett, Haight, Martin, and Vann, JJ., concur."

In *Stevens vs. Meyers* (supreme court, appellate division, May 16, 1902), 76 N. Y. Supplement, 332, the plaintiff brought suit to recover the value of goods procured by the defendants with intent to cheat and defraud the plaintiffs. Ingraham, J., delivering the opinion of the court, said:

"In this case when the action came on for trial, plaintiff had a cause of action based on fraud which, if established, would not have been affected by the discharge."

Pridmore *vs.* Torrey, 77 N. Y. Supp., 86 (May, 1902), was an action for fraud. Defendant pleaded his discharge in bankruptcy as a bar to the action. Judge Gildersleeve, delivering the opinion of the court, said:

"The discharge in bankruptcy could not relieve the defendant from a debt *founded on fraud*, even though such debt was included in the schedules, and defendant cannot claim exemption on that ground from the debt on which the plaintiff seeks to recover in this action. See bankr. act, sec. 17, subdivision 4; Frey *v.* Torrey, *supra*."

In re Wollock, 120 Fed. R., 516; 9 Am. B. Rep., 685 (district court, N. D. Illinois, January, 1903), was an application to stay a suit in tort pending in the State court. The opinion delivered by the district judge, Kohlsaat, is as follows:

"This matter comes on to be heard on motion of the bankrupt to restrain prosecution of a suit in tort brought by Crump Bros. against the bankrupt pending his discharge. The suit was instituted subsequently to the filing of the petition herein. The declaration counts upon fraud of defendant therein (bankrupt herein) in securing credit upon goods purchased. The State court has advanced the cause to a speedy hearing, on the representation of plaintiff therein that the claim will be released by a discharge in bankruptcy unless reduced to a judgment prior to discharge. The bankruptcy matter stands now on objections to discharge. If it is true, as contended, that the Crumps will be barred from pressing their suit for fraud unless the same is reduced to judgment before discharge, manifestly they should be per-

mitted to proceed to judgment at once. On the other hand, if the claim would not be released by a discharge of the bankrupt in bankruptcy, then there are many reasons why the action in the State court should be restrained pending such discharge, among which may be named: First, that the bankrupt should be placed in a position to plead such discharge; second, it is peculiarly the province of the court having jurisdiction of the suit for recovery on the ground of fraud to pass upon the question as to whether the claim is one that is barred by a discharge under the statute, or not; third, if it shall become general practice to cast upon the district court, in bankruptcy proceedings, the duty of determining the character of claims presented, the work of administrating the bankrupt estates will become unconscionably prolix and burdensome.

"The question raised involves a construction of section 17 of the bankruptcy act [U. S. Comp. St. 1901, p. 3428]. Clause 2 of this section, by its terms, seems to limit the exception to judgments in actions for fraud, or by obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another. A common-sense reading of this clause is to the effect that nothing short of a judgment obtained in the cases specified will serve to take a case out of the general rule, and release it from the effect of a discharge; but this clause must be read in connection with clause 4 of section 17, which is as follows, viz.:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

"The result of the State court proceeding can have no effect upon the bankrupt's right to a discharge. He is entitled to a discharge, in a proper case, notwithstanding some claims against him are found to be based upon fraud, and the question for the court having jurisdiction of a given case is simply whether that claim is released by the discharge. Nor can the character of a claim be affected by any steps taken subsequent to the filing of the petition. The rights of the parties must be adjusted as of the time of filing the petition in bankruptcy. It is inconceivable that the Congress intended to enact by section 17 that no claim, however tainted by fraud, even to the extent of theft or robbery, should be

excepted from the effect of a discharge in bankruptcy, unless reduced to the form of a judgment. From the reading of the act, it is evident that no such idea was contemplated. In my judgment, a fair interpretation of section 17, in the light of the previous act and the spirit of the law, leaves no doubt but that fraud in a claim, as well as a judgment based upon a fraudulent claim, is sufficient to bring the claim within the exceptions of the statute. This view is supported by many authorities. *In re* Blumberg (D. C.) 94 Fed. 476; *In re* Thomas (D. C.) 92 Fed. 912; *In re* Lewensohn (D. C.) 99 Fed. 73; *In re* Steed (D. C.) 107 Fed. 682; Loveland, Bankr. §§ 293, 295; Lowell, Bankr. 488; Collier, Bankr. (3d ed.) 200, 202; Bracken *v.* Milner (C. C.) 104 Fed. 522 (Neighbor's transaction); Frey *v.* Torrey (Sup.) 73 N. Y. Supp. 201; *Id.*, 75 N. Y. Supp. 40; Stevens *v.* Meyers (Sup.) 76 N. Y. Supp. 332.

"There is nothing in the point made by counsel that the court is without power to stay a proceeding begun after the filing of the petition in bankruptcy. The argument reduces itself to an absurdity. Section 11 of the act of 1898 [U. S. Comp. St. 1901, p. 3426] provides that the court shall stay a suit which is founded upon a claim from which a discharge would be a release, etc.; the plain object of the section being to bring all matters affecting provable claims into the district court. Section 11 provides that nothing in that section shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not therein enumerated. Clause 15, § 2 [U. S. Comp. St. 1901, p. 3420], provides that the court has such jurisdiction at law and in equity as will enable it to 'make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of this act.' It will be seen that the court is required to stay only provable claims, by the statute. This would not limit its power to provable claims in a case, the prosecution of which would interfere with the proper enforcement of the act. It is admitted by the petition presented herein for a restraining order that the action sought to be stayed is an action on the case for fraud. If tried, the verdict must be 'Guilty' or 'Not guilty.' Fraud is the gist of the action. Unless fraud is proven, there can be no recovery. The judgment of the court will be conclusive as to the existence or absence of fraud. Manifestly,

under the holding above set out, the court is entirely without jurisdiction to stay the proceeding, under the language of the statute; and where, as in this case, there is nothing but the question of fraud involved, to which a discharge cannot be pleaded, there can be no embarrassment to the administration of the bankruptcy cause by this court,—consequently no case made for the general powers of this court.

"The petition to stay suit is denied."

In Watertown Carriage Co. *vs.* Hall, 68 Fed. R., 629 (court of appeals of New York, Oct. 30, 1903), the complaint alleged that the plaintiff was the owner and entitled to the immediate possession of the sum of $65, consisting of bank bills, etc.; that on a day named the defendant did fraudulently and unlawfully convert, misappropriate, and embezzle said sum of money; that before the commencement of the action the plaintiff demanded the said sum of money of the defendant, but that the defendant refused to deliver the same to the plaintiff; and that the plaintiff was damaged in the sum of $65, with interest from the day of said conversion, misappropriation, and embezzlement. The defendant interposed, as a defense to the cause of action and as a bar to the same, his discharge in bankruptcy. To this defense the plaintiff demurred, on the ground that it was insufficient in law upon the face thereof. The demurrer was sustained in the lower courts.

O'Brien, J., delivering the opinion of the court of appeals, said:

"The only question, therefore, presented by this appeal is whether a discharge in bankruptcy is a good defense to a cause of action such as is stated in the complaint herein. * * * In other words, does the defendant's discharge in bankruptcy protect him in this action from liability resulting from his act in 'fraudulently and unlawfully converting, misappropriating and embezzling,' the $65 of the plaintiff's money? The answer to that question is to be found in the plain language of the present bankrupt law enacted in 1898, act July 1, 1898, c. 541, sec. 17, 30 Stat., 550 [U. S. Comp. St., 1901, p. 3428], as follows: * * * 'The cause of action

stated in the complaint is plainly excepted from the operation of the discharge as a release of the defendant from liability.' It does release him from certain debts and obligations, but not from liability for the cause of action stated in the complaint, and hence the answer setting up the discharge as a defense was open to demurrer, and so it has been held since the enactment of the present bankrupt law. Frey *v.* Torrey, 70 App. Div., 166; 75 N. Y. Supp., 40, affirmed on opinion below, 175 N. Y., 501; 67 N. E., 1082; **Crawford v. Burke,** 201 Ill., 581; 66 N. E., 833. These views sufficiently answer the question certified as we have construed it."

Let us now look at the cases cited by counsel for plaintiffs in error in support of their views on the question under consideration. They cite: *In re* Rhutassel, 96 Fed. R., 599 (district court Iowa, Sept., 1899); *In re* Hirschman, 104 Fed. R., 69 (district court Utah, Oct., 1900); *In re* Lewensohn, 99 Fed. R., 74 (district court, S. D. N. Y., January, 1900); Hargadine McKittrick Dry Goods Co. *vs.* Hudson, 111 Fed. R., 361 (circuit court, E. D. Mo., Oct., 1901); Morse & Rogers *vs.* Kauffman, 40 S. E. Rep., 916 (supreme court, Va., March, 1902); Gee *vs.* Gee, 87 N. W. Rep., 1116 (supreme court Minn., Nov., 1901); *In re* Bullis, 73 N. Y Supp., 1048 (supreme court, N. Y., App. Div., Jan. 7, 1902); Harrington *et al. vs.* Herman, 72 S. W. Rep., 546 (supreme court Mo., division No. 2, Feb., 1903), and Crosby *vs.* Miller (55 Atl. Rep., 328; 25 R. I., 172).

Counsel say (Brief, 67):

"The decisions of the Federal courts support our views of this question."

If a "decision" imports a judicial determination of a question which is involved in the suit, then we say, counsel have not cited *a single "decision" of a Federal court which "supports their views."* The reason why they have not is simple. There were none to cite. We say this, after having made a thor-

ough examination of the Federal decisions rendered since the passage of the bankruptcy act of 1898 to the present time. Counsel cite two Federal cases (*In re* Rhutassel, *supra*, and *In re* Hirschman, *supra*) in which the dicta therein favor their construction; and they cite only one case decided in the State courts (Morse *vs.* Kauffman, *supra*) which supports their views, and in which the determination of the question we are now considering was necessary to the decision.

In re Rhutassel, supra:

In this case the bankrupt filed his petition for a discharge. A creditor who had obtained a judgment on a promissory note objected to the granting of a discharge on the ground that the debt on which he had obtained his judgment was created by false pretenses and fraudulent representations on the part of the debtor. The learned judge, after deciding that the only question before him was as to the right of the bankrupt to a discharge, and that the effect of a discharge could not be considered in the case then pending before him, proceeded, unnecessarily, to give his views as to the proper construction of section 17. It is quite evident that he expressed his views without much thought or consideration. He said:

"If it had been enacted that a discharge should not bar claims or debts created by false pretenses or false statements, such a provision would have been a fruitful source of litigation in the future, and would have subjected the bankrupt to *constant worry and pressure* from creditors, claiming that the debts due them had in fact been created by false statements with respect to the financial condition of the debtor, and were, therefore, not within the bar of a discharge; and hence, the *wisdom* of the provision that limits the exception to judgments which show on their face that the claim merged therein was based on the fraud of the bankrupt."

It is, perhaps, not to be wondered at, that the learned judge construed the statute as he did, when we consider the reasons

which he thought had influenced Congress to make a discharge in bankruptcy a bar to claims created by fraud or by false and fraudulent representations. Congress, he thought, had so much regard for the bankrupt, whether honest or dishonest, that it would not permit his tranquillity or peace of mind to be disturbed by subjecting him to "CONSTANT WORRY AND PRESSURE" from creditors claiming that the debts due them *had, in fact, been created by false and fraudulent statements as to his financial condition.*

That the learned judge did not feel quite sure that the reasons which he gave for his construction of subdivision 4 were correct, becomes quite apparent when he returns to the only question properly before him, and decides it in accordance with his construction of *subdivision 2.* He says:

"But *whatever the reason* for the enactment may have been, the fact remains that the second clause of section 17 embraces only *judgments* for frauds, or for obtaining property by false pretenses or statements or for willful injuries to person or property, and cannot be extended to include claims *not in judgment*, or judgments based on the contract, express or implied, of the bankrupt, and not upon a fraud or wrong of the nature of those described in the clause in question."

In re Hirschman, supra:

This was a case, as stated by the court, where—

"Several parties have applied to the court to direct the manner of liquidation of their claims against the bankrupt, under section 63, sub. sec. '*b*' of the bankrupt act of 1898." * * * "For the petitioners it is contended that section 63, sub. sec. '*b*' of the bankrupt act of 1898, authorizes the liquidation and subsequent proof of claims *ex delicto.*"

The only question involved in that case was as to the proper construction of section 63, and as to whether the petitioning creditors had a right, under that section, to have their claims liquidated and proved. It is evident that what Judge Marshall said about a "cause of action for a tort not

reduced to judgment" was said with reference to *subdivision 2*, and not with reference to *subdivision 4* of section 17. He did not undertake to give a construction to subdivision 4. Whatever he did say, with reference to section 17, was simply *dictum*, as no question involving a construction of any part of that section was before him.

In re Lewensohn, supra:

This case is adverse to counsel's contention. It was an application of the bankrupt for a stay of proceedings on the warrants which had been issued for his arrest. He did not ask to have the *suit* stayed, because, as Judge Brown expressly held, *the suit was founded upon a claim* (obtaining goods by means of false representations) *from which a discharge would not be a release.* The bankrupt sought exemption from arrest under general orders 12 and 30, and under section 9*a*, subdivision 2. Counsel seek to give the impression that the protection from arrest, which was given on condition that the bankrupt give bond, was granted on the ground that the suit was founded "*upon a claim from which a discharge in bankruptcy would be a release.* If it was not the intention of counsel to convey such an impression, then their object in citing the case is not apparent.

Hargadine McKillrick Dry Goods Co. vs. Hudson, supra:

This was an action of debt on a judgment rendered in a State court in Texas. "The judgment sued on was obtained upon promissory notes and was not in an action for fraud." Defendant pleaded his discharge in bankruptcy. Plaintiff replied "that the debt which was the foundation of the judgment sued on in this case was created by the fraud of the defendant." The court said:

"The real question involved in this case is whether or not the discharge in bankruptcy operated as a release of the defendant from the *judgment* sued on."

With the exception of the question of *res adjudicata*, all that was involved and decided in that case is stated in the syllabus (1), which is as follows:

"A *judgment* rendered on promissory notes cannot be brought within bankr. act 1898 sec. 17*a* cl. 2 excepting from the provable debts released by a discharge, debts which 'are judgments in actions for frauds,' by evidence that the debt was fraudulent in its inception; *the creditor being conclusively bound by his election to waive the fraud and sue on the contract.*"

Morse & Rogers vs. Kauffman, supra:

This is the only case cited by counsel and in which the construction of subdivision 4 of section 17 was necessary to the decision and which supports their contention. The case appears to have been but superficially considered. We submit that it can have but little weight as an authority, in view of the reasons given and the authorities cited in support of the court's construction of the statute. The court said that in the *Rhutassel* case the same "construction was placed upon the enactment * * * in a *well-considered opinion.*" The "well-considered opinion," so far as it related to the construction of subdivision 4, was merely the dictum of Judge Shiras. The court quoted the note appended to the report of the Rhutassel case by the editor of the Am. B. R. We have shown by quotations from the 3d edition of Collier on Bankruptcy, published after the Rhutassel case was reported, that Mr. Collier's views were directly the opposite of those expressed in the note referred to. The court cited the Lewensohn case and Bracken *vs.* Milner. Both cases, as we have pointed out, are adverse to the construction given by the Virginia court. The court also cited the Bullis case, to which we will refer later on.

Gee vs. Gee, supra:

In that case suit was brought by plaintiff upon a *judgment* obtained by him against his partner in an action for an accounting. Defendant answered, setting up his discharge in bankruptcy, as a defense to the action.

"Plaintiff, by reply, alleged that the judgment referred to was for the defendant's fraud and misappropriation *while acting in a fiduciary capacity.*"

The court said:

"Under plaintiff's contention the disposition of this appeal is within a very narrow compass depending upon the construction of that portion of the Federal bankruptcy act of 1898, which excepts from the discharge judgments in actions for fraud * * * or debts created by fraud * * * in any fiduciary capacity * * *. But it is unnecessary in this case to anticipate a decision of the Supreme Court of the United States in that respect, for the judge, *not having before it a judgment for fraud*, fully considered the weight of evidence on that question, and found *that there was no fraud*, upon testimony that amply supports his conclusions in that respect and *forecloses any further inquiry upon that issue* here, leaving for us the simple duty of construing the meaning of the provision that excepts '*fraud in a fiduciary capacity*' from the operation of the bankruptcy discharge."

It will be noticed that the plaintiff limited himself to two questions: (1) Was the debt upon which the judgment was founded created by fraud? (2) Was the fraud committed by the defendant *while he was acting in a fiduciary capacity?* Upon those issues alone the case was tried. Both issues were found against the plaintiff. The case is not in point. The question whether a discharge in bankruptcy can be interposed as a shield against positive fraud committed by the bankrupt while he was *not acting in a fiduciary capacity* within the meaning of the bankruptcy act, was not involved in the case.

In re Bullis, supra:

This was an application of the bankrupt for the discharge of judgments that had been rendered against him. The judgment creditor contested the application on the ground that the judgments were recovered by reason of the bankrupt's fraud. It was held that the judgment was rendered in an action for fraud, and that the bankrupt was not released. The decision was based on the provisions of *subdivision 2 of section 17*. What Justice Springer said as to the construction of subdivision 4 was dictum, and cannot be reconciled with the following statement made by him in the course of the opinion:

"*One exception that has pervaded all of our bankrupt laws is, that where the insolvent has become liable for the payment of a debt which had its origin in his own positive dishonesty, the way is not open for his discharge from that liability.*"

In *Frey vs. Torrey*, 75 N. Y. Supp., 40, Justice Laughlin, referring to the Bullis case, said:

"The view presented by appellant seems to have been adopted by the appellate division in the fourth department *In re* Bullis (73 N. Y. Supp., 1047), but the construction of subdivision 4 was not essential to the decision in that case. The question there was whether a judgment had been discharged by a discharge in bankruptcy of the judgment debtor, and the point decided was that the judgment had been recovered in an action for fraud, and therefore was excepted from the operation of such discharge by subdivision 2 of said section 17."

Harrington & Goodman vs. Harman, supra:

This was a proceeding to revive a *judgment* founded upon an account for merchandise sold by plaintiffs to defendant. Defendant pleaded his discharge in bankruptcy. Plaintiffs replied that the debt evidenced by the judgment was created by fraud. In the course of the opinion, the court said:

"It is, however, insisted by plaintiffs that they have the right to go beyond the record in this case and show that the creation of the debt upon which the judgment is based was by fraud and false representation. *This we do not think plaintiffs have the right to do under the provisions of the bankrupt law in force at the time of the entry of the discharge of the defendant in the bankruptcy proceedings.* * * * The form of the action must be determined by the petition; hence the affidavit for an attachment in aid of the suit forms no part of the petition, and cannot be looked to in determining the form of the action."

The court decided the case on the ground that the record showed that "the judgment sought to be restrained was based upon an ordinary suit—on account for goods sold and delivered" and that the plaintiffs did not have "the right to go beyond the record in the case and show that the creation of the debt upon which the judgment was based was by fraud and false representations." What the court said on other questions was wholly unnecessary to the decision of the case.

Ousley vs. Miller, Vaughn & Co., supra:

This was a petition for stay of execution issued on a judgment rendered in an action of trover and conversion. The question was whether an action of trover and conversion was an action for fraud. The court held that it was not and that, therefore, the judgment was barred by the defendant's discharge in bankruptcy. That was all that was decided in the case.

Opposing counsel say:

"It must be remembered, however, that bankrupt laws always work ruthless destruction of creditors' rights and remedies. *Such laws are never passed in the interest of the creditor class, but wholly in the interest of the debtor class*" (Brief, 74).

The history of bankruptcy legislation shows that no such law was ever enacted, either in this country or in England. It has been repeatedly declared by the highest courts of both countries that bankrupt laws are enacted with the object and intention of relieving *honest* men, but not *rascals*, from the burden of their debts.

Counsel have wholly misconceived the purpose and intention of Congress in framing and passing the bankruptcy act. This accounts to some extent, at least, for their misconstruction of it.

The bankruptcy bill passed by Congress in 1898 was reported to both houses by a conference committee. Mr. Henderson, ex-Speaker of the House, was chairman of the Judiciary Committee, and was also a member of the conference committee that reported the bill. In presenting the report he said that the bill "will thoroughly protect *honest men* in preserving their rights against *dishonest debtors*."

Mr. Ray, of New York, a member of the Judiciary Committee of the House, and also a member of the conference committee that reported the bill, said:

"It is absolutely essential that we guard against *frauds*, and so frame our law that *dishonest men shall not have the benefits of it.* * * * When men begin to *cheat* or *defraud*, or give preferences, and are insolvent, it is time that proceedings are taken *to protect all creditors.* * * * The gentleman says that the commercial honor and integrity of the nation and of its people should be maintained. I agree with the gentleman in that statement. *The maintenance of commercial honor and integrity is just what this bill seeks to secure, and the law asks nothing and seeks nothing beyond that. The person who has maintained and who maintains his commercial honor and integrity, will be unharmed by the severest and most drastic measure found in this bill.* * * *

"If there is anything in this bill that is a terror to an honest man, I regret that the provision is found in the bill. I know no such provision can be found. If on the other hand there is one or more provisions in this bill *that is a terror to the dishonest man*, I rejoice that I have had a hand in framing the provision. No man who cares for the busi-

ness and commercial interests of this country, or who cares for the prosperity of this people, desires to have it possible *for the debtor to cheat his creditor*, or have a creditor oppress his honest debtor. *We have made it impossible for either of these things to occur.* * * *

"No just claim can be made that an *honest* man will suffer under these provisions. They are just, necessary, and in the interest of *debtors and creditors alike*" (Congressional Record, House, June 28, 1898).

The bill, as presented by the conference committee, was passed without amendment.

In the case of *In re Silverman*, 22 Fed. Cases, 135, 139, Judge Deady said:

"It (the bankrupt law) is remedial, and seeks to protect the honest creditor *from being overreached and defrauded by the unscrupulous.* It is intended to relieve the *honest*, but unfortunate, debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew."

In the case of *In re Dow's Estate*, 105 Fed. Rep., 889, 890 (dist. court, Iowa, Dec., 1900), Judge McPherson said:

"*The law for proceedings in 'voluntary' bankruptcy does not exist for rascals. A dishonest debtor has no standing in such proceedings.*"

In the case of *In re Becker*, 106 Fed. Rep., 54, 56 (dist. court, N. Y., January, 1901), Judge Coxe said:

"A discharge is intended to relieve misfortune, *but it must be misfortune coupled with absolute honesty.*"

In the case of *Turner vs. Turner* (district court, D. Indiana, May 20, 1901), 108 Fed. Rep., 785, 788, Judge Baker says:

"The object of the bankrupt act (1898) was to release the honest and unfortunate debtor from the burden of his debts. * * * The change in the language of the present statute from that employed in the former statutes does not neces-

sarily require a change of construction. The difference of language ought to be so clear and distinct as to evince a manifest intention to change the law so that the interpretation given to former statutes relating to the same subject-matter should be clearly inapplicable in the construction of the latter statute."

In *Lubke vs. Thomas*, 116 U. S., 606, 607, Mr. Justice Miller, speaking for the court, said:

"It is the essence of the bankrupt law that when the bankrupt has complied with all the conditions of the statute and surrendered his property, he should be released from all debts *except those of a fiduciary character or founded in fraud.*"

In the case of *In re Scott*, 126 Fed. Rep., 981 (dist. court, Del., Jan., 1904), Judge Bradford, speaking of the bankruptcy act, said:

"It was designed to relieve unfortunate but *honest* debtors and to secure a proper distribution of their assets among their creditors."

In *McDonald vs. Brown*, 10 Am. B. R., 58 (supreme court R. I., Feb. 3, 1903), the court said:

"The policy of the bankrupt law is not to relieve an insolvent debtor from liabilities arising out of his fraud, or other wrongdoing, but to relieve him from his debts and obligations which were *honestly* contracted and incurred, but which, because of misfortune of some sort, he has become unable to meet. To hold otherwise, as it seems to us, would be to make the law an instrument of wrong and oppression."

The court quoted with approval the following from *Disler vs. McCauley*, 71 N. Y. Supp., 949:

"The purpose of the bankrupt law was to relieve failing *honest* debtors from their money obligations, and not free tortuous debtors from liabilities for their wrongs. * * * The *spirit of the bankrupt law is to govern.*"

In the recent case of *Tinker vs. Colwell* (not yet reported) this court, speaking of discharges under section 17, said:

"It was an *honest debtor*, and not a malicious wrongdoer that was to be discharged."

Opposing counsel impute to Congress the intention of passing a law to relieve the *swindler*, the *embezzler*, and the *thief* from all pecuniary liability, as well as the honest but unfortunate man, from the burden of his debts.

Within five months after the defendants commenced business they were hopelessly *insolvent*, which fact they well knew, but kept carefully concealed; yet, with liabilities constantly increasing, and assets constantly diminishing, they kept right on in business, and held themselves out to the public as solvent and worthy of confidence, and continued to demand, receive, and fraudulently appropriate to their own use, the money and securities of their customers until May 20, 1895, when they went into court, and asked that a receiver be appointed to take possession of and distribute among the victims of their fraud what little remained. It is a matter of common knowledge that men have been compelled to wear stripes for conduct less reprehensible.

VIII.

As to the assignment of error that the court erred "in refusing to admit proper and competent evidence offered by the defendants in the circuit court."

Plaintiffs in error have not complied with the rule of this court which provides that, "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected."

Counsel have evidently thought it would be better not to

comply with the rule, but claim, in general terms, that the court "refused to allow us (them) to prove that the debt was not fraudulently contracted."

By referring to the record, it will be seen that counsel offered to prove:

1. That in October or November, 1894, the defendant Crawford told the plaintiff that at that time he (Crawford) had sold Metropolitan Traction "short" at Philadelphia (Rec., 231).

2. That "up to very near the time of the failure" the defendants "regarded" the accounts which had been "put in as worthless," as "valuable assets of the firm" (Rec., 233).

Counsel said, "*If* we offer to prove," etc. That won't do. It has been repeatedly held that an offer to prove is insufficient. The witness must be called and questioned on the stand. The record shows that neither of the defendants was on the stand when counsel asked the court, "*If* we offer to prove," etc. It appears from the record that all objections to the evidence offered were withdrawn, and that counsel had the opportunity to introduce it if they saw fit to do so.

Mr. Justice Carter, delivering the opinion of the Supreme Court, in this case, said:

"In the first place, after the court had sustained plaintiff's objection to the testimony of the defendants as to their good or bad faith in the transactions complained of, the plaintiff withdrew, in open court, his objections to such testimony, and stated that the same might be admitted without objection, but the defendants declined to avail themselves of such withdrawal and refused to call any witness, and it is evident from the record that they preferred to save their exception for appeal, rather than to have the defendants heard as witnesses in the case. We must hold that appellants waived the alleged error of which they are now complaining."

Counsel claim that their plea *puis darrein continuance* and the replication thereto "presented distinct *issues of fact* to be tried and determined upon the evidence." The plea and the replication thereto presented no "*issues of fact.*" They presented issues of law only. The replication did not deny the allegation that the defendants had received their certificates of discharge in bankruptcy, but it did deny the averments in the plea that the plaintiff's claims were provable, or that they were barred by the defendants' discharge. As was said by this court in Tinker *vs.* Colwell, *supra*, the averments in the plea were mere conclusions of law, and not averments of fact.

It is true that the conclusions of law, averred in the pleas, were sworn to by the defendants, Crawford and Valentine, but we hardly think that their oaths, as to what the law was, will settle the legal question for this court. In the case of *In re* Wooten, 118 Fed. Rep., 670, the court said:

"No layman, and few lawyers, would be willing to make oath to a legal objection or proposition. Though confident of their opinion, all would hesitate to support it under oath."

Evidently, the judge had never held court in Chicago.

Counsel say that the doctrine of *Mount vs. Sholes* is "an antiquated feature of the machinery of practice." In the lower courts they said it was "a harsh, antiquated and extremely technical rule." Undoubtedly their clients also think that the *eighth commandment* is a "harsh and antiquated rule." Whatever may be their opinion of that rule they evidently treated it as *obsolete.*

IX.

The Gambling Question.

Like the "ill bird that fouls its own nest," Crawford and Valentine now say that they were *gamblers, keepers of a "bucket-shop"* and *violators of the criminal statutes of their own State;* and that the transactions between themselves and the defendant in error, were conducted on a gambling basis, and, therefore, were illegal and void; and that no recovery can be had. This is their last resort, after their unsuccessful efforts, thus far, to escape the payment of the damages resulting from the gross frauds of which they stand convicted.

If there was any foundation for the charge that defendant in error was "speculating in market differences," in the stock in controversy, why was not that charge made in the trial court, where he could have introduced evidence bearing especially on that question? As was said by the supreme court of Illinois, in its opinion in this case:

"The record gives no hint, by pleading, evidence, or propositions of law, that this question was raised or sought to be raised in the trial court."

Was it the scheme of counsel for Crawford and Valentine to lead the defendant in error to think that they never thought of raising such a point, and thereby to induce him to believe that there was not the slightest necessity for him to produce evidence which would be especially applicable upon that question? Or was the gambling question an *afterthought* with them? It certainly was one or the other.

The following is quoted at page 114 of counsel's brief:

"*All contracts for the purchase or sale of property* with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists

by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the *contract* and *market prices*, are mere wagers, or gambling contracts, and void.

Schneider *v.* Turner, 130 Ill. 39."

Counsel for plaintiffs in error endeavor to make it appear that the law, as stated in *Schneider vs. Turner*, applies to the case at bar.

There is not a word of evidence in the record to show that the "*contracts for the purchase or sale*" of the Metropolitan Traction stock, in controversy, were made "with the understanding or agreement," secret or otherwise, between the parties to this suit, that the stock was "not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the *contract* and *market prices*."

Not once, have opposing counsel referred to a page of the record, where their repeated assertions, that the "defendant in error was speculating in market differences," are substantiated. Do counsel imagine that this court will attach any importance to their assertions unless they show by the record that what they assert is true?

"Market differences," as shown by the authorities which counsel have cited, are "the differences between the *contract* and *market prices*." Dealing in "differences" means that, *at the time a purchase or sale is made*, there is an agreement or understanding between the purchaser or seller, with the other contracting party, that the property bought or sold shall not be received or delivered, but that the transaction shall be adjusted by the receipt or payment of the difference between *the price at which the property was bought or sold, and the market price at the time the contract is closed.*

First, as to the 450 shares of Metropolitan Traction stock mentioned in the third count of the declaration, and which was purchased by *Valentine & McAvoy* for the defendant in error (Rec., 10).

There was no contract between the defendant in error and

Crawford & Valentine for the purchase of the 450 shares of stock mentioned. Consequently, there could have been no "understanding or agreement" whatever between the defendant in error and *Crawford & Valentine*, at the time the contract for purchase was made, as to the acceptance or delivery of the stock; or as to the "adjustment of differences;" or as to anything else. Crawford & Valentine did not commence business until long after the 450 shares had been purchased. Their connection with the stock commenced on the 30th day of June, or the first day of July, 1894, when the defendant in error caused the 450 shares of Metropolitan Traction stock, and 100 shares of Chesapeake and Ohio stock, to be transferred to them, and put under their control as his brokers and agents, and as collateral security for the amount which he owed Valentine & McAvoy on the stock, and which indebtedness Crawford & Valentine assumed and agreed to pay. It is not pretended that there was anything illegal in that transaction. That transaction was not a "*contract for the purchase or sale of property.*" It would not have been illegal for the defendant in error, and Crawford and Valentine, to have agreed, at the time of the transfer, that the stock should be sold the next day, and that the proceeds of the sale, less the balance which he owed on the stock, should be paid to him. There could have been no "adjustment of differences" between the *price at which the stock was bought* and the *market price on the day of sale*, because Crawford & Valentine *did not make the purchase*, was not a party to the *purchase contract*, and had *no interest whatever in what the stock originally cost.* It did not concern them. Their contract with defendant in error was, that they would assume and pay the amount which he owed Valentine & McAvoy on the stock, and take the stock as collateral security, and hold it for him, as his brokers, agents and pledgees, and subject to his orders, until he satisfied their claim against him. The transactions between the defend-

ant in error and *Crawford & Valentine* were separate and distinct from his transactions with *Valentine & McAvoy*. The contract which Crawford & Valentine entered into with him and the duties and obligations which they assumed are set out in the declaration, and are entirely independent of the contract between him and *Valentine & McAvoy*, and under which the latter purchased, held, and carried the stock for him, as his brokers and agents. There is nothing to show that the contract or understanding between the defendant in error and Valentine & McAvoy, as to the purchase of the 450 shares, and its final disposition, was not perfectly legal. It is to be presumed that it was. As a matter of fact, if the gambling question had been raised in the trial court, there would have been no difficulty for the defendant in error to have shown that the stock which was transferred by Valentine & McAvoy to the plaintiffs in error had been purchased by the defendant in error *as an investment*, and *with the distinct understanding* that the stock should be held and carried by Valentine & McAvoy until the defendant in error could make arrangements to have it taken up and paid for.

Second, as to the 300 shares of Metropolitan Traction stock delivered to the plaintiffs in error on the 29th of January, 1895, as mentioned in the fifth count of the declaration (Rec., 14).

Bankrupt and desperate, Crawford & Valentine conceived the scheme of getting into their hands 300 shares more of the Metropolitan Traction stock, belonging to the defendant in error, and of fraudulently appropriating the same to their own use, as they had done with the rest of his stock. On January 29, 1895, after having obtained from him $1,000, as part payment on Metropolitan Traction stock which they falsely and fraudulently represented to the defendant in error that they were then holding and carrying for him, but

which they had, in fact, previously sold without his knowledge, and without rendering him any account of the sales, Crawford & Valentine solicited him to turn over to them 300 shares of Metropolitan Traction stock which he then had in the hands of Jamieson & Co., and offered to advance $24,000 on the 300 shares, and hold and carry the stock for him, as his brokers and agents—the market value of the 300 shares at that time being $27,600. Jamieson & Co. had purchased the stock through their correspondents, Huhn & Glendenning, at Philadelphia, in whose hands the stock was then held (Rec., 39, 40, 48). The defendant in error had purchased the 300 shares of stock, before the panic in 1893, for $42,000, and had paid $18,000 on the purchase, and would have taken the stock up and paid the balance due on it, had it not been for the panic. (Panics sometimes interfere with the best-laid plans.) So anxious were Crawford & Valentine to get the stock into their possession, or under their control, that they requested the defendant in error to go at once to Jamieson & Co.'s office and ask them to *telegraph* to Huhn & Glendenning to deliver the stock to Toland Bros. & Co., who were, at the time, one of Crawford & Valentine's correspondents, and who would receive the stock for them and advance thereon $24,000. The defendant in error did as Crawford & Valentine requested (Rec., 39, 40). Huhn & Glendenning delivered the stock to Toland Bros. & Co. and received from them $24,000, which was the balance then due on the stock, from the defendant in error. That transaction between the defendant in error and Crawford & Valentine was not a "*contract for the purchase or sale of property.*" They had nothing to do with the purchase of the property. They took it from the defendant in error, as collateral security, for a loan of $24,000, and under an agreement with him, to hold and carry the stock for him, as his brokers, agents, and pledgees, and subject to his orders, and to the payment of the amount advanced on it. It would have been just as legal

for the defendant in error to have, at any time, had Crawford & Valentine sell the 300 shares of stock, and, after deducting the amount of the loan, pay over to him the balance coming to him, as it would have been to have had the stock delivered to him on the payment of the loan.

The correspondence between Toland Bros. & Co. and Crawford & Valentine, on January 29, 1895, with reference to the transfer of the stock, is as follows (Rec., 157):

JAN'Y 29TH, 1895.

"Messrs. TOLAND BROS. & Co., *Phil'a* (Rec., 157).

"DEAR SIRS: We confirm instructions sent by wire today to receive from Messrs. Huhn and Glendenning 300 shares Metropolitan Traction stock and pay them $24,000 for our account.

"Very resp'f'y

"(Signed) CRAWFORD & VALENTINE,

"Per J. T. KILGOUR."

"JAN'Y 29TH, '95.

"Messrs. CRAWFORD & VALENTINE (Rec., 157):

"118 *La Salle St., Chicago, Ill.*

"DEAR SIRS: Confirming your telegram of today, we have paid Huhn & Glendenning $24,000, and have received from them 300 shares of Metropolitan Traction which we charge to your account.

"Yours truly

"(Signed) TOLAND BROS. & Co."

Four days after Crawford & Valentine got control of the 300 shares they drew a draft on Toland Bros. & Co. for $2,500 against the equity of the defendant in error in said 300 shares, which draft Toland Bros. & Co. paid and charged the same to Crawford & Valentine's account. The 300 shares of stock were then pledged to Toland Bros. & Co. for $2,500 more than the amount for which the stock had been pledged by defendant in error. On March 13, 1895, Crawford & Valentine sold, through Toland Bros. & Co., the 300

shares, without the knowledge or consent of defendant in error, and without rendering him any account of the sale, for the sum of $29,050, and fraudulently appropriated to their own use the entire reversionary interest of defendant in error in said stock. Not only that, but after the sale of the stock they represented to him that *the stock had not been sold, but that it was still in their hands and that they were still holding and carrying it for him.* Not satisfied with the $5,050, which was the difference between the amount loaned to defendant in error on the stock and the amount for which the stock was sold by Crawford & Valentine, they continued to demand and receive, from the defendant in error, further payments from him on the stock so sold, and interest on the stock also. But, as we said at the outset, it is a waste of time to discuss the question of fraud.

The fraud committed by Crawford and Valentine in their transactions with the defendant in error is shown in the record. As the question of fraud has been settled in the courts below, it is unnecessary to discuss it here. Our purpose is to show that the defendant in error was not "speculating with the plaintiffs in error in *differences between the contract and market price.*" Our statements with reference to the 450 shares of stock which defendant in error caused to be transferred from Valentine & McAvoy to Crawford & Valentine will apply, also, to the 300 shares of stock which he caused to be delivered to Toland Bros. & Co., at Crawford & Valentine's request.

Third. Crawford & Valentine purchased for the defendant in error, and on his order, only 100 shares of Metropolitan Traction stock—50 shares on September 28, 1894, and 50 shares on March 29, 1895.

They delivered to the defendant in error the following written notices of the purchases (Rec., 39):

"Crawford & Valentine, bankers & brokers,
"116 La Salle street.

"Chicago, September 29, 1856.

"J. E. Breed.

"Dear Sir: We have this day bought for your account and risk 50 shares Metropolitan Traction—price 110½.

"Respectfully yours,

"Crawford & Valentine."

Second notice with some heading:

"March 29, 1887.

"J. E. Breed.

"Dear Sir: We have this day bought for your account and risk 50 shares Metropolitan Traction—price 99.

"Respectfully yours

"Crawford & Valentine."

In stating the contract and understanding had between the parties to this suit, counsel for plaintiffs in error claim that their assertion that defendant in error was "speculating in differences" is untrue.

They admit (brief, p. 19) that plaintiffs in error were "under a contractual obligation to deliver to the defendant in error, at his demand, and on payment of $22,710.75, 250 shares of Metropolitan Traction stock." They admit that the plaintiffs in error "were, according to the undertaking which they had made with (defendant in error) on a good and valid consideration which he had carried out, under obligation to give him property worth, on the market, $7,262.25 more than he was obliged to pay them for it." Even if all the stock in controversy had been purchased by the plaintiffs in error for the defendant in error, are not the above admissions utterly inconsistent with the claim that there was any agreement, or mere understanding, between the parties to this suit that the stock was "not to be delivered or accepted, but the contract settled by an adjustment of the differences between the contract and market price?" If there was such an agreement, or understanding,

then plaintiffs in error were *not* under any "obligation to deliver to the defendant in error, at his demand, and on payment of $44,718.71, 550 shares of Metropolitan Traction stock." If there was such an agreement, or understanding, then they were *not*, "according to the undertaking which they had made with him *on a good and valid consideration* which he had carried out, under obligation to give him property worth, on the market $7,462.54 more than he was obliged to pay them for it."

They were under no obligation to deliver him any property whatever. They were under obligation to pay him differences, only.

Furthermore, the evidence shows that some time prior to April 1, 1895, the defendant in error tried to make arrangements through his friend, William Kent, to take the stock up and pay the plaintiffs in error the amount due on it (Rec., 193). It further appears from the evidence that about 9 o'clock, on the morning of May 20, 1895, the defendant in error, having heard that there was some trouble between Crawford and his partner, Valentine, over money matters (Rec., 162), went to their office and gave an order to have the stock forwarded from Philadelphia, so that it could be taken up and paid for (Rec., 50, 51), and that he did not know that the defendants had suspended payment until between 11 and 12 o'clock on that day (Rec., 52, 162).

We think that we have said enough on the gambling question. In fact, we think that we have said more than enough, and that we ought to apologize for so doing. We will say, however, in extenuation, that, in view of the fact that opposing counsel have devoted so much of their brief to misleading statements and misrepresentations on that question, we could not resist the temptation to say something in reply. The information which opposing counsel have imparted to the court, in their dissertation on stock brokers and their *usual methods and customs*, may not aid

this court very much in arriving at a correct conclusion on the Federal question before it, but it will probably serve the purpose of convincing their clients that they made no mistake in selecting their counsel.

We submit that the claims of defendant in error were not barred by the discharge of plaintiffs in error, in bankruptcy, and that the judgment should be affirmed.

JOHN E. BURKE,
In Person.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 22.

RICHARD C. CRAWFORD AND EDWARD A. VALENTINE, PLAINTIFFS IN ERROR,

vs.

JOHN E. BURKE.

PETITION FOR REHEARING.

MARTIN CLARK,
C. J. WILLETT,
Counsel for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15763

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UPREME COURT OF THE UNITED STATES.

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RICHARD C. CRAWFORD AND EDWARD A. VALENTINE, PLAINTIFFS IN ERROR,

v.

JOHN E. BURKE, DEFENDANT IN ERROR.

N ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Now comes the said defendant in error, by his counsel, d respectfully petitions this honorable court for a rehear- g of said cause, and in support of his petition begs leave present the reasons following:

This action was for fraud and for willful and mali- ous injuries to the plaintiff's reversionary interest property, and was not an action in trover for con- ersion.

The court has characterized and treated this action as an tion in *trover for conversion*.

We respectfully submit that neither as to the first five unts nor as to the last five counts in the declaration was

the action an action in trover, and that the reasoning of the court based upon the theory that the action was in trover for conversion cannot apply to this case.

By referring to the declaration, it will be seen that in each of the ten counts therein a separate and distinct cause of action is set out. In each of the first five counts *damages* are claimed by reason of the injuries willfully and fraudulently committed by the defendants to the plaintiff's *reversionary* interests in property. It was alleged in the declaration, and shown upon the trial, that the injuries to the plaintiff's reversionary interests were committed with *intent to cheat and defraud him*, and were therefore *willful and malicious*.

As to the last five counts in the declaration, the action was brought to recover damages for the *deceit* practiced upon the plaintiff by means of false and fraudulent representations, whereby the defendants obtained from him, at different times, sums of money amounting in the aggregate to the sum of $10,800.

Under the allegations in the first five counts, and upon the proofs adduced, an action in *trover* could not have been maintained. An action in trover will not lie unless the plaintiff was, at the time of the conversion, entitled to the immediate possession of the property converted. This is a well-established rule. It was neither alleged in the declaration, nor was it shown by the proofs, that the plaintiff had the *right of possession* of the stocks in controversy at the time they were converted by the defendants. On the contrary, it appeared from the declaration, and also from the evidence, that at the time the defendants sold the stock in controversy the plaintiff was *not* entitled to the possession of the stock, as the defendants were holding it as security for the balance due them thereon from the plaintiff. The plaintiff had simply a reversionary interest in the stock, and a conversion of that interest, either fraudulently or otherwise, would not have entitled the plaintiff to bring an action in *trover*. An action on the case for damages resulting from the defend-

ants' fraud, and from the willful and malicious injuries committed by them to the plaintiff's reversionary interests in the stocks, was the proper remedy, and not an action in trover for conversion.

We ask leave to cite—

1 Chitty Pl. (14th ed.), 134:

"For injuries to personal property not committed with force or not immediate, or where the plaintiff's right thereto is in *reversion*, case is the proper remedy."

Id., p. 139:

"For injuries to any personal property in *reversion*, trespass or *trover* cannot be supported; and case is the only remedy."

Id., p. 148*a*:

"If there be an outstanding special property in another, the general owner should sue in case for the injury to his *reversion*, not in *trover*, for the value of the goods."

In Pollock on Torts, star page 280, the author says:

"But an owner not entitled to immediate possession, might have a special action on the case, not being *trover*, for any permanent injury to his interest, though the wrongful act might also be a trespass, *conversion* or breach of contract, as against the immediate possessor."

Cooley on Torts (2d ed.), 521:

"In illustration of cases in which a showing of title is not sufficient, those may be instanced in which the owner has parted with the right of possession for a time, under some contract or lease or bailment. In such a case, if the term has not expired, or the bailment been terminated, at the time the conversion takes place, the owner cannot sue in *trover*, because, not having had the right of possession, his only injury is in his *reversionary* interest, and in suing for that he must count on the special case, and not on the conversion."

1 Saunders' Pl. and Ev. (5th Am. ed.), 715:

"An action on the case, though, in its most comprehensive signification, it includes an action of assumpsit, as well as an action arising on a tort, at the present time is only understood as meaning an action to a tort arising out of the special circumstances of the case. (See Chitty Pl., 123.) It lies in general, however, to recover damages for tort not committed with force, actual or implied, or having been occasioned by force where the property affected was not tangible, or the injury was not immediate, or consequential, or where the interest in the property was only in *reversion*. * * * And the party may recover damages for such injury, whether it be to the absolute or relative rights of persons, or to the personal or real property in possession or *reversion*, or to the real property, corporeal or incorporeal."

In Ayer *v.* Bartlett, 9 Pick., 156, a mill and machinery were leased by Ayer to one Schofield. During the term the machinery was attached as the property of Schofield. Ayer brought action against the sheriff. Declaration contained counts in trover and case. It was contended that the action would not lie. Putnam, J., delivering the opinion, said:

"We think that this objection is unfounded. If trover could not, we are satified that trespass upon the case could be maintained for such an injury to the reversionary interest in personal property. In Chitty Pl., 197, it is said that case is the proper remedy."

In the State courts the defendants took the position that as the plaintiff was not entitled to the possession of the stocks at the time they were sold by the defendants, the present action, which they insisted on calling an action in *trover*, could not be maintained.

They also endeavored to make it appear to this court that the trial court held that the action was in *trover* for conversion. Misled by an incorrect quotation in the brief of counsel for defendants, this court says, in the opinion, that the trial court found that the plaintiff "had a right to recover in trover."

The trial court made no findings which can be regarded except those embraced in the judgment and in the propositions of law submitted to it.

It was for this reason that the plaintiff was unable to raise in the supreme court of Illinois the question as to the proper measure of damages, as will appear from the opinion of the court.

The trial court found the defendants guilty upon all the counts in the declaration, and assessed the plaintiff's damages at $9,690.91 (Rec., 34). From the bill of exceptions taken in the trial court, it appears that at the time the judgment was rendered the court said:

"I have fully considered the numerous briefs in this case and have reached the conclusion that there was a conversion of what is termed the reversionary interest in this stock by the defendants in this case, and that, therefore, IF it was in trover, they had a right to recover, and that it is not such a debt as is barred by the bankruptcy act" (Rec., 245).

It has been repeatedly held by the supreme court of Illinois that remarks made by a trial court at the time it renders a judgment are entirely immaterial, as they are no part of the record. The judgment is. It is to that we must look. If the judgment is right, the reasons that may be assigned by the court for rendering it are of no consequence.

The judgment shows that defendants were found guilty upon each and all the counts in the declaration, and that damages were assessed upon each and all of the counts (Rec., 34). If one or more of the counts be sufficient to sustain the judgment, that is all that is required. The last five counts in the declaration and the evidence introduced at the trial show that the defendants obtained from the plaintiff, by means of false and fraudulent representations, the sum of $10,800.

The judgment rendered was only for the sum of $9,890.21. A judgment for a much larger sum should have been ren-

dered, and would have been rendered, had not the trial court adopted a wrong theory in the assessment of damages.

The court declined to decide an essential question in this case, namely: Were the claims made by the plaintiff in this action provable?

The first question presented to the court for decision was, whether the claims made by the plaintiff in this action were provable under the provisions of the bankruptcy act, but the court declined to decide that question, saying:

"Whether the effect of paragraph *b* is to cause an unliquidated claim which is susceptible of liquidation, but is not literally embraced by paragraph *a* to be provable in bankruptcy, we are not called upon to decide, as we are clear that the *debt* of the plaintiff was embraced within the provision of paragraph *a*, as one *founded upon an open account or upon a contract, express or implied*, and might have been proved under section 63*a* had the plaintiff chosen to waive the tort and take his place with the other creditors of the estate."

The court does not say that the *claims made by the plaintiff and involved in this case* were embraced within the provision of paragraph *a* "as claims founded upon an open account or upon a contract express or implied," and might have been proved under section 63*a*, but says "that the *debt* of the plaintiff" was so founded and might have been proved under section 63*a* "*had plaintiff chosen to waive the tort*"—that is to say, if the plaintiff had chosen to waive his claims for fraud and for willful and malicious injuries to his reversionary interests in the stock in controversy, and instead of seeking to recover in an action *ex delicto* the damages which he had sustained by reason of the fraud and willful and malicious injuries committed by the defendants he had made a claim based upon an open account or upon a contract express or implied, and would have been content with what he might be able to recover in an action in assumpsit, then the

claim or suit could be a debt "entitled within the provision of paragraph 4, as one founded upon an open account or upon a contract express or implied, and might have been proved under section 63a, had plaintiff chosen to waive the tort.

The court held that even the "debt" of which it spoke was provable on condition that plaintiff "waive the tort and rely his claim with the other creditors of the estate." "But as that condition was not complied with, as the plaintiff did not waive the tort, does it not follow that the "debt of the plaintiff" was not provable?

The question presented to this court [illegible] decision was not whether a "debt founded upon an open account, or upon a contract express or implied" was provable, because there could be no controversy upon that point, but the question was whether the plaintiff's claim for fraud and for willful and malicious injuries to his reversionary interests in property was provable under the provisions of section 63.

That was one of the federal questions involved in the case. A decision of that question in plaintiff's favor would have settled the case and an affirmance of the judgment would have necessarily followed.

We respectfully ask, Was not the plaintiff entitled to have the court examine and decide that question?

The plaintiff's claims for damages were founded upon the fraud perpetrated by the defendants and upon the willful and malicious injuries committed by them to his reversionary interests in property and were not provable in bankruptcy.

It is unquestionably true that the transactions had between the plaintiff and the defendants were of such a character that the plaintiff had an election to bring an action or action to recover the damages sustained by him by reason of the fraud and willful and malicious injuries to his reversionary

interests, or to waive the fraud and injuries and bring an action in assumpsit to recover a *debt* "founded upon an open account or upon a contract express or implied," but he could not do both.

In saying that "the debt of the plaintiff was embraced within the provision of paragraph *a* as one founded upon an open account or upon a contract express or implied," the court must necessarily have referred to the "debt" which the plaintiff might have recovered in an action in assumpsit, and which "might have been proved under section 63*a* *had the plaintiff chosen to waive the tort and take his place with the other creditors of the estate.*"

The court certainly could not have meant to be understood as saying that the plaintiff's claim for fraud "might have been proved under 63*a* had plaintiff chosen to waive the tort," for that would be equivalent to saying that he *would have to waive his claims for fraud in order to prove them.*

If the plaintiff's claims involved in this action were "founded upon an open account or upon a contract express or implied," they would, as a matter of course, have been provable under the express provisions of section 63*a*, but in that case the present action, which was an action *ex delicto*, could not have been maintained. An action on claims so founded would necessarily be an action in assumpsit, and the bringing of such an action would of itself have been a waiver of all claims founded upon tort.

The plaintiff sued in tort, and he must have recovered upon claims founded upon tort and not upon claims founded upon contract. The judgment which the plaintiff recovered in the present case is conclusive evidence that the claims upon which the action was based were claims founded upon tort and not upon contract.

If it can be said in a case involving the construction of the bankruptcy act that whenever a party has an election to sue on contract or sue in tort, if he sues in tort, his claims founded upon tort are claims founded upon contract, the

same may be said in all other cases. That would indeed be a novel doctrine.

We respectfully say that it is not possible that it was the intention of the court to hold that the plaintiff's claims for damages arising out of the defendants' positive fraud, and out of their willful and malicious injuries to his reversionary interests in property, and based wholly upon such fraud and injuries, were "debts originating" or "founded upon an open account or upon a contract express or implied."

Our views as to the absence of any intention on the part of the court to hold that the claims which the plaintiff made and which were involved in this action were "founded upon an account or upon a contract express or implied," find confirmation in the fact that the court in construing subdivision 4 of section 17 proceeded to consider and determine the question whether debts created or founded upon fraud, but which were not created by fraud committed in an official or fiduciary capacity within the meaning of the statute, were excepted under subdivision 4 from the operation of a discharge. It would have been wholly unnecessary for the court to have decided or even considered that question if the plaintiff's claims in this action were debts "founded upon an open account or upon a contract express or implied," because debts so founded are not only provable, under the provisions of section 63*a*, but they are clearly within the class of debts from which a bankrupt is released by virtue of his discharge.

In construing section 17, the court certainly would not treat the plaintiff's claims as *debts* created by or founded upon fraud, and then, in construing section 63, hold that the plaintiff's *claims for fraud* were "founded upon an open account or upon a contract express or implied."

In the opinion the court says:

"But it is strenuously insisted by the plaintiff that a claim for the conversion of personal property is not within the

scope of section 17, because it is not a 'provable debt' within the definition of section 63*a*."

It is true that in the course of his argument the plaintiff called the attention of the court to the fact that the provision of the act of 1867, allowing "unliquidated damages * * * on account of any goods or chattels wrongfully taken, converted or withheld," to be assessed and proved, was omitted from the act of 1898. It is also true that he drew the inference that the omission of such an important provision from the act of 1898 must mean the omission of the purpose with which the provision was inserted in the act of 1867. In support of his views upon that point he cited Watertown Carriage Co. *v.* Hall, 77 N. Y. Supp., 1028. What he said upon the point will be found in twelve or fifteen lines of his brief at page 14. That is the extent of his argument, that a claim for the conversion of personal property is not a provable debt. But it was not at all necessary for the plaintiff to make any argument whatever upon that point, for the simple reason that his action was not in trover for conversion, as we have already pointed out.

Continuing, the court says:

"Did the latter section (section 63) stand alone, there would be some ground for saying that a claim, though 'founded upon an open account, or upon a contract, express or implied' would not be a provable debt, if plaintiff elected to treat the conversion as fraudulent and sue in *trover*, though he might have chosen to waive the tort and bring an action for a balance due on account."

Whether the latter section (section 63) stands alone or "must be read in connection with section 17," we cannot see where there is any ground for saying that a claim "founded upon an open account or upon a contract express or implied," would not be a provable debt under section 63*a*.

A person whose property has been unlawfully converted by another has an election to do one of two things: either to

make a claim founded upon tort, or to make a claim founded upon contract. He cannot do both. If he elects to sue in assumpsit his claim must be founded upon contract. A claim so founded is, of course, provable. If he elects to sue in trover his claim must be founded upon tort. It certainly cannot be said that it is "founded upon an open account, or upon a contract express or implied."

The court refers to the ruling made in certain cases under the bankruptcy acts of 1841 and 1867 with regard to the operation of a discharge where the creditor has an election to sue in tort or in assumpsit (Williamson *v.* Dickens, 27 N. C., 259; Oliver *v.* Hughes, 8 Penn. St., 426; Bradner *v.* Strang, 89 N. Y., 299–307). But the case of Strang *v.* Bradner, 114 U. S., 555, 560, cited in plaintiff's brief at page 20, must have been overlooked by the court.

That case arose under the bankruptcy act of 1867, a copy of which will be found in plaintiff's brief at page 8.

The special business of the plaintiffs in that case was to purchase wool which they forwarded to defendants, as commission merchants, to sell on account. Plaintiffs, for the accommodation of defendants, often furnished them with promissory notes for the purpose of enabling them to carry on business. By false and fraudulent representations that certain notes given by plaintiffs in February had not been used, defendants obtained from plaintiffs in March a new set of notes. The action brought by plaintiffs was to recover *damages* for the *deceit* practiced upon them.

Mr. Justice Harlan, delivering the opinion of the court, said:

"The present suit, brought to recover a judgment for the amount plaintiffs were compelled to pay to *bona fide* holders of the March notes, proceeds upon the ground that the appellees have sustained damages by reason of the false and fraudulent representations made by Strang, on behalf of his firm, whereby the appellees were induced to execute and deliver to that firm the four notes dated March 1875. Is this claim for *damages* of a class from which the bankrupts

were relieved by their respective discharges in bankruptcy?"

* * * "That representation—as the jury in effect found—was made with the intent to deceive the plaintiffs in reference to the actual state of things, and to induce them to do what defendants knew they would not otherwise have done, or been asked to do. If Strang's conduct does not constitute positive fraud, or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character.

"It is contended, however, that as Strang and Holland Bros. were under a legal obligation, apart from any responsibility for the alleged fraudulent representations by Strang, to protect the plaintiffs against liability on the notes dated in March, the latter could have a claim against the estate of the several bankrupts for such amounts as they were compelled to pay on account of their being accommodation makers and endorsers; consequently, it is argued, the defendants are released, by their respective discharges in bankruptcy, from the present claim for damages. To this proposition there are two answers: 1. While the plaintiffs *might* have based their claim entirely upon the legal obligation of defendants to take up the notes at their respective maturities, they were not bound to waive their right to proceed against the defendants for *damages* on account of *fraud* in procuring their execution. This action is brought to recover *damages* for the *deceit* practiced upon the plaintiffs. The claim here asserted is not one from which the bankrupts are protected by their discharges, *for it is not a claim provable against their estates in bankruptcy* (Rev. Stat., secs. 5076–5072, inclusive, 5117, 5119). 2. But had the plaintiffs waived their right to claim damages specifically for the deceit practiced upon them and made a claim against the estate of the bankrupts based wholly on their legal obligation to save plaintiffs harmless on account of their being the makers and endorsers of the notes in question, or if the present action *had been based upon that obligation*, and not upon the *fraud* committed by defendants, it would not follow that the defendants would be protected by their discharges in bankruptcy."

* * * "It is therefore clear that whether the claim asserted by plaintiffs is regarded as one arising out of the *deceit* or *fraud* of the defendants, or as a *debt* created by fraud, the discharges in bankruptcy do not constitute a defense."

As to the last five counts in the declaration in this case, the action was brought to recover *damages* for the *deceit* practiced upon the plaintiff by the defendants in obtaining from him $10,800 by means of false and fraudulent representations, and can, in no respect, be distinguished in principle from Strang *v.* Bradner. In that case, as in this, property was obtained by the defendants by *fraud.* In that case, as in this, the plaintiff might have waived his right to make a claim for *damages* on account of *fraud*, and sued on contract to recover a *debt.* In that case, as in this, the defendants contended that, as the plaintiff might have made a claim against them founded upon a contract, express or implied, they were released by their respective discharges in bankruptcy from the plaintiff's claim for damages arising from fraud. In that case, as in this, the plaintiff elected to sue in tort, as he had a right to do, and *made a claim for damages based wholly upon the fraud* committed by the defendants. In that case, as in this, a discharge in bankruptcy was interposed as a defense. In that case, as in this, the first question presented to this court for decision was, whether the *claims* made by the plaintiff were provable in bankruptcy.

In that case the court held (1) that the plaintiff 's claim was "one arising out of the deceit or fraud of the defendants;" and (2) that a claim arising out of *deceit* or *fraud* was not provable in bankruptcy.

It is to be noted that the act of 1867 provided for the proof of "*debts* created by fraud," while the act of 1898 does not.

It may be asked why was it expressly provided in the act of 1867 that a debt created by fraud "may be proved" if the debt might have been proved under the act without any such express provision? Again: If it was the intention of Congress to make debts created by fraud provable under the act of 1898, why did Congress omit from that act the provision of the act of 1867 allowing such debts to be proved?

In the opinion in this case it is said "that a change in phraseology creates a presumption of a change in intent." Does not the omission from the act of 1898 of the provision of the act of 1867 allowing debts created by fraud to be proved create a stronger presumption of a change in intent than if there had been simply a change in phraseology?

As further evidence of a change of intention with reference to the proving of claims founded upon tort is the fact that Congress omitted from the act of 1898 the following provision, contained in the act of 1867:

"All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him may be proved and allowed as *debts* to the amount of the value of the property so taken or withheld with interest."

It must be conceded that a claim for damages arising out of fraud which could not be proved under the provisions of the act of 1867 cannot be proved under the provisions of the act of 1898.

If the plaintiff's claim in Strang *v.* Bradner was a claim arising out of the deceit or fraud of the defendants, as this court held it was, it cannot be said that the claims made by the plaintiff in the last five counts in his declaration in this case are not claims arising out of the deceit or fraud of the defendants.

If a claim for damages *arises* out of deceit or fraud, it *originates* and is *founded* upon deceit or fraud.

It certainly cannot be said that a claim for damages arising out of deceit or fraud is a "*debt* originating upon an open account or upon a contract express or implied" without confounding a *claim* arising out of deceit or fraud with a debt founded upon contract.

The court, continuing, says:

"But we think that section 63*a* defining provable debts must be read in connection with section 17, limiting the opera-

tion of discharges in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to *judgments*, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity."

We respectfully ask, why must section 63*a*, defining provable debts, be read in connection with section 17? The reason assigned by the court is that in section 17 "the provable character of claims for fraud in general is recognized."

But the court did not base its decision that the "*debt* of the plaintiff" was provable upon any inference drawn from section 17 as to the provable character of "claims for fraud in general," but based it solely upon the ground that "the debt of the plaintiff was embraced within the provision of paragraph *a* as one founded upon an open account or upon a contract express or implied." If the plaintiff's claims in this action are not "claims for fraud," but are *debts* "founded upon an open account, or upon a contract express or implied," it is difficult to see why section 63*a* must be read in connection with section 17 in order to show that debts founded upon a contract express or implied are provable, as the later section provides in express terms for the proof of such debts.

The court does not hold that *unliquidated claims* created by or founded upon positive fraud, or upon willful and malicious injuries to reversionary interests in property, are provable under paragraph *a* of section 63; but whether such claims are provable under paragraph *b* the court says it is not called upon to decide. But we respectfully say that that very question was involved in this case, and was presented to the court for decision, and not the question whether debts founded upon an account or upon a contract were provable.

We respectfully ask, also, how or in what manner is the provable character of claims for frauds in general recognized in section 17?

The court says:

"By excepting from a discharge claims for frauds which have been reduced to judgment or which were committed by the bankrupt while acting as an officer or in a fiduciary capacity."

We respectfully submit that section 17 does not except *claims for frauds* which have been reduced to judgment, but does except "*judgments in actions for frauds*," which judgments, as well as judgments in actions in assumpsit, are made provable under section 63*a*(1), while "claims for fraud" are not provable under that section.

As judgments in actions for frauds were made provable they were excepted from the operation of a discharge. How can it be said that the provable character of claims for fraud in general is recognized by excepting from a discharge *judgments* in actions for fraud, such judgments being provable debts?

The "certain frauds" which the court holds are excepted from the operation of a discharge are frauds committed by the bankrupt "while acting as an officer or in any fiduciary capacity." The court also holds that debts created by fraud so committed are provable debts.

If the term fraud in subdivision 4 of section 17 is to be limited to fraud committed by the bankrupt while acting in an official or fiduciary capacity, and if debts created by fraud of that character are to be regarded as provable, then, according to the ruling of the court, section 17 excepts from the operation of a discharge only *provable debts*.

It can hardly be said that the provable character of claims for damages on account of fraud and on account of willful and malicious injuries to reversionary interests in property is recognized in section 17 by excepting from the effect of a discharge only certain *provable debts*, among which are official or fiduciary debts created by fraud.

By limiting the operation of a discharge to provable debts

section 17 recognizes a class of claims that are *not* provable. Belonging to that class are the plaintiff's claims for damages in this case.

It is said in the opinion:

"Certainly paragraph *b* does not embrace debts of an unliquidated character and which, in their nature, are not susceptible of being liquidated."

We respectfully ask, Can there be such a thing as a "debt" which, in its nature, is not susceptible of being liquidated? Does not the term "debt" imply a legal obligation? Are not all *debts* susceptible of liquidation by judgment or in some other manner?

If claims for fraud in general are not excepted from the operation of a discharge, it may be fairly inferred that they would have been excepted had they been provable.

The court asks:

"If no fraud could be made the basis of a provable debt, why were certain frauds excepted from the operation of a discharge?"

Our contention is that all claims for damages on account of positive fraud are excepted from the operation of a discharge, either under the express provision of section 17 or because they are not provable debts.

Assuming, however, for the purpose of argument that only debts created by certain frauds are excepted from the effect of a discharge under section 17, and that such debts are provable, let us see what inferences may be drawn from that fact as to the provable character of claims for damages arising from frauds.

If, under the act of 1898, debts created by fraud are limited to official or fiduciary debts and such debts are provable, then the fact that they are provable would of itself be sufficient reason for excepting them specifically from the operation of a discharge.

Under the act of 1867 a *debt* created by fraud was made provable by the express provision of the act (section 33; Revised Statutes, section 5117), but the debt so created was excepted from the operation of a discharge.

Under the same act this court distinguished a *claim for damages* arising out of deceit or fraud from a "*debt* created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character," and held that such *claims for damages* were not provable (Strang *v.* Bradner, 114 U. S., 555).

Why should not claims for damages arising out of deceit or fraud be distinguished from debts created by fraud, and held not provable, under the act of 1898 as well as under the act of 1867?

If, under the act of 1898, claims for damages arising out of deceit or fraud are not expressly excepted from the operation of a discharge, the reason therefor may be found in the fact that such claims are not provable.

Judgments in actions for willful and malicious injuries to the person or property of another are excepted from the operation of a discharge, but there is no provision excepting specifically claims for damages arising from such injuries, and yet a bankrupt is not released from claims of that character, for the reason that such claims are not provable under the provision of section 63*a*.

Is any debt or claim provable which is not included in the classes of debts which are made provable under paragraph *a* of section 63?

We contend:

That paragraph *a* classifies and defines all claims or "debts which may be proved," while paragraph *b* provides for the liquidation of such unliquidated claims only as are embraced within the provisions of paragraph *a*, and thereafter for the proof and allowance of such claims.

Our contention with reference to "debts which may be proved" is fully supported by the authorities cited in plain-

tiff's brief (pages 8-24) to which we respectfully refer the court.

In language clear and explicit Congress took the pains to specify and define in paragraph *a* the "debts which may be proved."

It is manifest that Congress intended to specify in paragraph *a all provable debts*. The fact that in no other section of the statute is a "provable debt" defined makes it quite clear that Congress intended to make provable only the debts mentioned in paragraph *a*.

In Dunbar *v.* Dunbar, 190 U. S., 340, Mr. Justice Peckham, delivering the opinion of the court, said:

"In section 63*b*, provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against the estate. *This paragraph b, however, adds nothing to the class of debts which may be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim coming within the provisions of section* 63*a, to be liquidated as the court should direct.*"

In the opinion in this case it is said that in section 17 "the provable character of claims for fraud in general is recognized."

But the court also says:

"*It certainly could not have been the intention of Congress to extend the operation of the discharge under section* 17 *to debts that were not provable under section* 63*a.*"

It follows, then, that a bankrupt is not released from a debt or claim which is not provable under paragraph *a* of section 63, and that section 17 adds nothing to the class of debts which may be proved under that paragraph.

Our contention is that claims for unliquidated damages arising from or created by positive fraud or by willful and malicious injuries to reversionary interests in property are

not included in any of the classes of debts specified in paragraph *a*.

We respectfully submit that the plaintiff's claims in this action cannot be regarded as provable without adding to the classes of debts mentioned in section 63*a* a class of claims of an entirely different character from those specified in that section, and no inference that may be legitimately drawn from section 17 would justify the making of such an addition. If such an addition were to be made by the court would it not be judicial legislation instead of judicial interpretation?

The plaintiff's claims for damages for fraud and for willful and malicious injuries to his reversionary interests in property are excepted from the operation of a discharge in bankruptcy.

The main reason given by the court for holding that debts created by fraud in general are not excepted from the operation of a discharge is stated in the opinion, as follows:

"The fact that the second subdivision of section 17 excepted from the discharge 'all judgments in actions for fraud, or of obtaining property by false pretences, or false representations,' indicates quite clearly that as to frauds in general it was the intention of Congress only to except from the discharge such as had been reduced to judgment, unless they fall within the fourth subdivision of those created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity.

"Unless these words relate back to all the preceding words of the subdivision, namely, the frauds and embezzlements as well as misappropriations or defalcations, it results that the exception in subdivision 2 of all judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by subdivision 4, whether judgment had been obtained or not."

We respectfully submit that the purpose of Congress in providing that a discharge should not operate upon "*judgments* in actions for frauds," etc., was to settle a question upon which there had been conflicting decisions.

In some jurisdictions the courts held that after a debt or claim for fraud or other tort had been merged in *judgment* it became not only provable but also a debt of record, and, as such, came within the operation of a discharge.

Wolcott *v.* Hodge, 81 Mass., 547; Ellis *v.* Hays, 28 Me., 385; Crouch *v.* Gridley, 6 Hill, 250; Kellogg *v.* Schuyler, 2 Denio, 73; Blake *v.* Bigelow, 5 Ga., 437; Comstock *v.* Grout, 17 Vt., 512; *In re* Adson Comstock, 22 Vt., 642; Manning *v.* Keyes, 9 R. I., 224; *In re* Wiggers, 2 Biss., 71; *In re* Samuel Hook, 3 McLean, 317; Hays *v.* Ford, 55 Ind., 52.

As this was contrary to its intention, Congress provided by subdivision 2 of section 17 that the bankrupt should not be released from such judgments. This, we respectfully submit, satisfactorily explains why subdivision 2 is found in section 17.

Referring to subdivision 2, the supreme court of Illinois said, in the opinion in this case:

"Such judgments were doubtless excepted to avoid the otherwise reasonable construction that as judgments, like other judgments, merging the cause of action, they would come within the operation of the discharge in bankruptcy."

In the case of Frey *v.* Torrey, 73 N. Y. Supp., 201 (decided at appellate terms), it is said:

"Under the act of 1867, doubts arose whether a judgment for fraud by merger of the original debt did not make the bankrupt's discharge operative upon the debt (*In re* Lewensohn, *supra*). Apparently, to dispel such doubts, subdivision 2 of section 17 of the present statute was enacted providing that the bankrupt's discharge shall not release him from provable debts which are 'judgments in actions for frauds,

or obtaining property by false pretences or false representations, or for willful and malicious injuries to the person or property of another.'"

In the same case, 75 N. Y. Supp., 40 (appellate division), the court said:

"There appears to have been some doubt whether such judgments would remain enforceable, and in view of the fact that Congress provides in subdivisions 1 and 5 of section 63 for proving judgments as debts, this subdivision was doubtless enacted to obviate such question, as well as to provide for cases, as has been seen, that were neither covered by the former law nor included in subdivision 4 of the present act (*In re* Lewensohn, 3 Am. Bankr. R., 594–596; Coll. Bank., 3d ed., p. 194)."

In re Wollock, 120 Fed. R., 516, it is said:

"It is inconceivable that Congress intended to enact by section 17, that no claim however tainted by fraud, even to the extent of *theft* or *robbery*, should be excepted from the effect of a discharge in bankruptcy unless reduced to the form of a judgment."

As said in Collier on Bankruptcy (1st ed.), 345:

"We think it will be conceded that there is in principle no more reason for releasing a tort-feasor from the amount due to another as damages, when it has been liquidated by some special mode of assessment, than when it has been liquidated by a judgment. The reason for making a discharge in bankruptcy no release of a judgment in an action for any of the torts mentioned in section 17 (2) is because of *the nature of the debt*, because of the *element of wrong* existing in it—and not because the claim has been put into the form of a judgment."

It is difficult for any one to conceive why a bankrupt should be released from a *claim* for fraud and not from a *judgment* for fraud.

To the courts which have overlooked the true reason for the enactment subdivision 2 has been a puzzle and has

given rise to a variety of theories and conjectures, most of which border on the fanciful.

Congress had precisely the same reasons for excepting from the operation of a discharge judgments in actions for frauds that it had for excepting judgments in actions for willful and malicious injuries to the property or person of another. If an injured party sustained damages by reason of libel, slander, assault and battery, *criminal conversation*, or malicious destruction of his property, it could hardly be said that Congress provided for the release of the bankrupt tort-feasor from all claims for damages unless such claims were merged in judgment, in order that the injured party might not be tempted to bring an action in *tort* rather than action in *assumpsit*.

Our views as to the reasons why subdivision 2 was incorporated in section 17 are confirmed by the subsequent action of Congress. The provision was enacted for the purpose of settling the question whether a judgment in an action in tort was barred by a discharge. While subdivision 2 settled one question, it gave rise to another. With that question we are confronted in this case. The question is this: By the enactment of subdivision 2 did Congress intend to release a bankrupt from all debts or claims for fraud unless they had been reduced to judgment or were created by fraud committed by the bankrupt while he was acting as an officer or in a fiduciary capacity?

When Congress found that its purpose in enacting subdivision 2 had been misunderstood by some of the courts, it proceeded, in February, 1903, to amend the subdivision by substituting the following:

(2.) "Are *liabilities* for obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another, or for alimony due or to become due or for maintenance or support of wife or child, or for seduction of an unmarried female or for criminal conversation."

The above amendment throws light upon the original enactment, and shows clearly that it was not the intention of Congress to have subdivision 2 given a construction which would result in the release of a bankrupt from a claim for deceit, unless the claim had been reduced to judgment or fell within subdivision 4.

In Neal *v.* Clark, 95 U. S., 70, this court, speaking through Mr. Justice Harlan, said:

"This case involves the meaning of the word 'fraud' as used in the thirty-third section of the bankruptcy law of 1867. * * * This court in Chapman *v.* Forsyth, 2 How., 202, said: 'The cases enumerated, "the defalcation of a public officer," "executor," "administrator," "guardian" or "trustee" are not cases of implied, but special trusts, and the "other fiduciary capacity" mentioned must mean the same class of trusts.'

"A like process of reasoning may be properly employed in construing the corresponding section of the act of 1867. It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows.' So, also, the meaning of a word may be ascertained by reference to the meaning of words associated with it. * * * In Brown's Legal Maxims, n. 450, it is said: 'The coupling of words together shows that they are to be understood in the same sense and when the meaning of any particular word is doubtful or obscure, * * * the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words.' The same author says (p. 455): In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the contexts, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter."

Applying these rules to this case, we remark that, in the section of the law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge

in bankruptcy, debts created by "fraud" are associated directly with debts created by "embezzlement." Such association justifies, if it does not imperatively require, the conclusion that the "fraud" referred to in that section means positive fraud or fraud in fact involving moral turpitude.

Referring to section 33 of the act of 1867 (Revised Statutes, 5117), it is said in the opinion in this case:

"The language of this section is so clear as to require no construction. It is plain and explicit to the effect that the fraud and embezzlement of the bankrupt need not have been committed by him while acting as an officer or in any fiduciary character, and that this character relates only to his defalcation. But under the act of 1898, there is no such severance in the fourth paragraph as would authorize us to say that the term 'fiduciary capacity' did not extend back to the words 'fraud, embezzlement, and misappropriation.'"

As the court holds that the words "fraud," "embezzlement," and "misappropriation" are associated directly with the word "defalcation," and that the qualifying phrase "while acting as an officer or in any fiduciary capacity" relates back to all the preceding words of the subdivision, and applies equally to all, then this court, adopting the process of reasoning which it has hitherto uniformly followed, must hold that the term "defalcation," owing to its association with the terms "fraud" and "embezzlement," means a *fraudulent* defalcation, and that all official or fiduciary debts arising from defalcation would be barred by a discharge, unless the defalcation is a *fraudulent one, involving moral turpitude.*

If, as the court says, "the intent of Congress in changing the language of the act of 1867 seems to have been to restore the act of 1841" with the addition mentioned, it hardly accomplished its purpose, if a mere change in the collocation of words for the sake of brevity requires the court to give to subdivision 4 of section 17 of the act of 1898 a construction WHICH WOULD ENTITLE A BANKRUPT TO A RE-

LEASE FROM HIS OFFICIAL OR FIDUCIARY DEBTS UNLESS SUCH DEBTS WERE CREATED BY FRAUD AND INVOLVING MORAL TURPITUDE.

Under the ruling of the court, an administrator, executor, guardian, or technical trustee might become a defaulter, and, when sued for the amount of his defalcation, go into bankruptcy, obtain his discharge, and successfully plead it as a defense, unless it could be shown that the defalcation involved actual, positive fraud.

Under the ruling of the court in this case, an embezzler who was not an officer or a technical trustee may, under the provisions of the bankrupt law, secure a release from all debts or claims arising from his embezzlement unless the debts or claims were merged in judgment before he filed his petition in bankruptcy and obtained a stay of proceedings under section 11*a*.

We respectfully submit that, in view of the results which will follow from the construction given by the court to subdivision 4 of section 17, the court will, upon further consideration of the subject, come to the conclusion that Congress intended subdivision 4 to be, in substance, a re-enactment of the analogous provision of the act of 1867, and that it should receive the same construction. Upon this point we respectfully refer the court to the authorities cited in plaintiff's brief under point VI, page 49.

It is an indisputable fact that the manifest trend of bankruptcy legislation had been to restrict rather than enlarge the effect of a discharge. It will be noticed that each successive bankruptcy act passed by Congress had increased the classes of debts which are excepted from the operation of a discharge.

If it was the intention of Congress to make such a radical change with reference to the operation of a discharge upon "debts created by fraud," it is fair to presume that it would have manifested that intention in some other way than by using in an abbreviated form, but arranged somewhat

differently, almost the identical language of a former statute which had a settled judicial construction. It is to be noted that in subdivision 4 the change is in the omission of "or" and "his" by way of ellipsis, and in the collocation of words rather than in the phraseology.

Referring to the Frey *v.* Torrey case, the court says:

"But so far as we know this is the only case that supports the construction given by the supreme court of Illinois."

We respectfully say that the court must have overlooked the cases cited in the plaintiff's brief under point VII, page 55.

Under the same point the cases cited in the opinion in this case are reviewed. We respectfully refer the court to what was said in reviewing those cases. We wish, however, to make one correction. The plaintiff said in his brief:

"If a 'decision' imports a judicial determination of a question which is involved in the suit, then we say, counsel have not cited a single 'decision' of a Federal court which 'supports their views.' The reason why they have not is simple. There were none to cite. We say this after having made a thorough examination of the Federal decisions rendered since the passage of the bankruptcy act of 1898 to the present time. Counsel cite two Federal cases (*In re* Rhutassel, *supra*, and *In re* Hirschman, *supra*), in which the dicta therein favor their construction; and they cite only one case decided in the State courts (Morse *v.* Kaufman, *supra*), which supports their views and in which the determination of the question we are now considering was necessary to the decision."

The plaintiff inadvertently omitted to say that Smith & Wallace *v.* Lambert (69 N. J. Law, 487), as well as Morse *v.* Kaufman (100 Va., 218) supported opposing counsel's views.

Respectfully submitted.

MARTIN CLARK,
C. J. WILLETT,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1904.

RICHARD C. CRAWFORD and EDWARD A. VALENTINE,
Plaintiffs in Error,
vs.
JOHN E. BURKE, *Defendant in Error.*
} No. 22.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

CERTIFICATE OF COUNSEL.

We, the undersigned counsel for said John E. Burke, defendant in error, do hereby certify that in our opinion there is just ground in point of law for the allowance of a rehearing in said cause.

MARTIN CLARK,
C. J. WILLETT,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 22.—October Term, 1904.

Richard C. Crawford et al., Plaintiffs in Error, vs. John E. Burke. } In error to the Supreme Court of the State of Illinois.

[November 7, 1904.]

This was an action in trover instituted September 10, 1897, in the Circuit Court of Cook County, Illinois, by Burke against Crawford & Valentine, plaintiffs in error, to recover damages for the wilful and fraudulent conversion of certain reversionary interests of the plaintiff in 550 shares of Metropolitan Traction stock.

There were ten counts in the declaration. In each of the first five counts it was alleged that the defendant firm of Crawford & Valentine were stock brokers and dealers in investment securities; that plaintiff employed the defendants as his brokers and agents to buy, hold and carry stocks for him subject to his order; that defendants had in their possession, or under their control, certain shares of the capital stock of the Metropolitan Traction Company, which they were holding as a pledge and security for the amount due them from the plaintiff on said stock; that defendants wrongfully, wilfully and fraudulently, and without his knowledge or consent, sold said shares of stock, and wilfully and fraudulently, and with intent to cheat and defraud the plaintiff, converted plaintiff's reversionary interest in said stock to their use, whereby it was wholly lost.

In each of the last five counts it was alleged that after defendants had wrongfully and fraudulently, and without plaintiff's knowledge or consent, sold the plaintiff's stock and converted the proceeds of such sales to their own use, they falsely and fraudulently represented to him that they still had the stock on hand and were carrying it for him; that their correspondents in Philadelphia, where the stock had been bought, were calling upon them for further demands or margins, and that it therefore became necessary to call upon the plaintiff to make further payments on the stock in order to comply with their correspondents' demands and to be secured against loss. It was averred in each of said counts that such representations were false and fraudulent, and by means thereof defendants obtained from the plaintiff the aggregate sum of $10,800.

To this declaration defendants pleaded not guilty, upon which issue was joined January 4, 1900, and on May 12, 1900, a jury trial was waived in writing. The case rested without action until January 3, 1901, when

defendants filed their separate pleas of *puis darrein continuance*, setting up that on April 5, 1900, the defendants had received their discharge in bankruptcy, in the District Court for the Northern District of Illinois, and that plaintiff's claims were provable and not excepted from the operation of such discharge. The plaintiff replied denying that his claim was provable, and averred that the same was excepted from such operation.

Notwithstanding the plea of *puis darrein continuance*, the plaintiff introduced evidence and proved the allegations in his declaration and the amount of damages he had sustained. Defendants were found guilty upon all the counts and judgment entered against them.

The case was taken to the appellate court, where it appearing that one of the justices had taken part in the trial of the case below, and that the two remaining justices were unable to agree upon the case, the judgment of the Circuit Court was affirmed. The judgment of the appellate court was also affirmed by the Supreme Court of Illinois, (201 Ill. 581,) to review which judgment this writ of error was sued out.

Mr. Justice BROWN delivered the opinion of the Court.

A year after this case was put at issue, and upon the opening of the trial, defendants filed their separate pleas *puis darrein continuance*, setting up their discharge in bankruptcy, and averring that plaintiff's claim was a provable debt, and the discharge a complete defense.

It is a well-settled principle of law, and was so held by the Supreme Court of Illinois in this case, that a plea *puis darrein continuance* waives all prior pleas, and amounts to an admission of the cause of the action set up in the plaintiff's declaration. (*Mount* v. *Scholes*, 120 Ill. 394; *East St. Louis* v. *Renshaw*, 153 Ill. 491; *Angus* v. *Trust & Savings Bank*, 170 Ill. 298; *Kimball* v. *Hutchinson*, 10 Wend. 675.)

But notwithstanding this, plaintiff was permitted to introduce evidence in proof of the fraud alleged in his declaration; and upon the conclusion of the trial the court found there had been a conversion of plaintiff's reversionary interest in the stock, for which he "had a right to recover in trover," and that it was not such a debt as was barred by the bankruptcy act. Upon appeal to the Supreme Court it was held that it was not necessary to the judgment to decide whether the allegations of the declaration were admitted by the pleadings, as they were established by the proof which had been adduced by plaintiff, "and the propositions held as law on that branch of the case being correct, judgment for plaintiff necessarily follows." That court also held that the case, being one of fraud, was not covered by the defendants' discharge in bankruptcy.

The only Federal question involved in the case is whether the Supreme Court of Illinois gave the proper effect to the discharge pleaded by the de-

fendants. If plaintiff's claim was not a provable debt, or was expressly excepted from the operation of the discharge, the decision of that court was right, but if it was covered by the discharge such discharge was a complete defense.

Section 17 of the bankruptcy act of 1898 contains, among other things, the following provisions:

"SEC. 17. A discharge in bankruptcy shall release the bankrupt from all of his provable debts except such as . . . (2) are judgments in actions for frauds,, or obtaining property by false pretences, or false representations, or for wilful and malicious injuries to the property or person of another . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity."

Under this section, whether the discharge of the defendants in bankruptcy shall operate as a discharge of plaintiff's debt, it not having been reduced to judgment, depends upon the fact whether that debt was "provable" under the bankruptcy act, that is, susceptible of being proved; second, whether it was or was not created by defendants' fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

1. Provable debts are defined by section 63, a copy of which appears in the margin.* Paragraph *a* of this section includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph *b*, two constructions are possible: It may relate to all unliquidated demands or only to such as may arise upon such contracts, express or implied, as are covered by paragraph *a*.

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*SEC. 63. DEBTS WHICH MAY BE PROVED.—(*a*) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt, who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) *founded upon an open account, or upon a contract, express or implied;* and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

(*b*.) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Certainly paragraph *b* does not embrace debts of an unliquidated character and which in their nature are not susceptible of being liquidated. (*Dunbar* v. *Dunbar*, 190 U. S. 340, 350.) Whether the effect of paragraph *b* is to cause an unliquidated claim which is susceptible of liquidation but is not literally embraced by paragraph *a*, to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provision of paragraph *a*, as one "founded upon an open account, or upon a contract, express or implied," and might have been proved under section 63*a* had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate. He did not elect to do this, however, but brought an action of trover, setting up a fraudulent conversion of his property by defendants. In the first five counts of his declaration he charges a fraudulent conversion of his interest in the stock, and in the last five counts that the defendants had induced him to make further payments on such stock in the way of margins, by false and fraudulent representations.

The question whether the claim thus set forth is barred by the discharge depends upon the proper construction of section 17, which declares that the discharge in bankruptcy relieves the bankrupt from all of his "provable debts" except such as ". . . (2) are judgments in actions for frauds, or obtaining property by false pretences, or false representations, or for wilful and malicious injuries to the property or person of another . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity."

Do these words apply to all debts created by the fraud, embezzlement misappropriation of the bankrupt, or only to such as were created while he was acting as an officer or in some fiduciary capacity? The fact that the second subdivision of section 17 excepted from the discharge "all *judgments* in actions for frauds, or of obtaining property by false pretences, or false representations," indicates quite clearly that as to frauds in general it was the intention of Congress only to except from the discharge such as had been reduced to judgment, unless they fall within the fourth subdivision, of those created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity. Unless these words relate back to all the preceding words of the subdivision, namely, the frauds and embezzlements, as well as misappropriations or defalcations, it results that the exception in subdivision 2 of all judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by subdivision 4, whether judgment had been obtained or not.

This conclusion is fortified by reference to corresponding sections of the former bankrupt acts. Thus, by the first section of the act of 1841 (5

Stat. 440) the benefits of that act were extended to all persons owing debts "which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." It is entirely clear that under this section a discharge was not denied to the bankrupt by reason of debts fraudulently contracted, but only to such as were created by his defalcation as an officer, or while acting in a fiduciary capacity.

We may remark here in passing that ever since the case of *Chapman* v. *Forsyth*, (2 How. 202,) this court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841, and has since been repeated many times under subsequent acts. (*Neal* v. *Clark*, 95 U. S. 708; *Hennequin* v. *Clews*, 111 U. S. 679; *Noble* v. *Hammond*, 129 U. S. 68; *Upshur* v. *Briscoe*, 135 U. S. 375, as well as in cases in the State courts too numerous for citation.)

Under the bankruptcy act of 1867 the list of debts excluded from the operation of the discharge was considerably larger. In section 33, Revised Statutes, 5117, it was declared that—

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

The language of this section is so clear as to require no construction. It is plain and explicit to the effect that the fraud and embezzlement of the bankrupt need not have been committed by him while acting as an officer or in a fiduciary character, and that this character relates only to his defalcation. But under the act of 1898 there is no such severance, in the fourth paragraph as would authorize us to say that the term "fiduciary capacity" did not extend back to the words "fraud, embezzlement and misappropriation." It was the opinion of the Supreme Court of Illinois that "a mere change in phraseology, apparently for the sake of brevity, rendering the meaning somewhat obscure, cannot be regarded as showing a legislative intent to depart so radically from precedents established by previous bankruptcy legislation and judicial decisions, as to provide that debts created by fraud or embezzlement of the bankrupt should be released by his discharge in bankruptcy, unless such fraud or embezzlement should be committed while the bankrupt was acting as a public officer, or in a fiduciary capacity."

Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and that Congress would not have used such different language in section 17 from that used in section 33 of the act of 1867,

without thereby intending a change of meaning. The view generally taken by the bankruptcy courts has been that the terms "officer" and "fiduciary capacity" extend to all the claims mentioned in paragraph 4, and are not confined to cases of defalcation. (*In re Rhutassel*, 96 Fed. Rep. 599; *In re Lewensohn*, 99 Fed. Rep. 73; *In re Hirschman*, 104 Fed. Rep. 69; *In re Cole*, 106 Fed. Rep. 837; *In re Freche*, 109 Fed. Rep. 620; *Hargadine-McKittrick Dry Goods Co.* v. *Hudson*, 111 Fed. Rep. 361.) The cases in the State courts are almost uniformly to the same effect. This is the natural and grammatical reading of the clause.

Thus in *Smith & Wallace Co.* v. *Lambert*, (69 N. J. Law 487,) the defendant pleaded to an action on a book account his discharge in bankruptcy, to which the plaintiff replied that the cause of action was created by the fraud of the defendant. The Supreme Court of New Jersey held the replication to be insufficient. "We think," said the court, "that under section 17 of the bankrupt law, to which reference has been made, there is no provision that would except from the discharge the debt upon which the present suit is brought."

In *Morse* v. *Kauffman*, (100 Va. 218,) it was pleaded against the discharge that the goods were procured by false pretenses. After holding that the case had not fallen within subdivision 2 of section 17, as there was no judgment for fraud, the Supreme Court of Virginia observed:

"It would seem to be equally clear that the demand of plaintiffs in error is not within the exception of subdivision 4 of section 17. It is not pretended that the claim was created by the bankrupt's fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity."

"The contention that 'fraud' should be segregated from the qualifying language 'while acting as an officer or in any fiduciary capacity' is without merit. Such interpretation would not only destroy the grammatical construction of the sentences and contravene its plain meaning, but it would likewise be inconsistent with paragraph 2 of the same section—that a creditor should have obtained judgment in an action for fraud in order to override a discharge in bankruptcy."

A like construction was given to subdivision 4 by the Supreme Court of Missouri in *Goodman* v. *Herman*, (172 Mo. 344,) by the Supreme Court of Minnesota in *Gee* v. *Gee*, (84 Minn. 384,) by that of Rhode Island in *Crosby* v. *Miller*, (25 R. I. 172,) and by the Supreme Court of New York, fourth department, in *In re Bullis*, (73 N. Y. Supp. 1047.) In this case the question was discussed at considerable length, the court saying:

"If *any* debt created by fraud, embezzlement or misappropriation is to be excepted from the application of the statute, then there is no necessity for subdivision 2, making a judgment essential to prevent the granting of the discharge under the statute."

We have not overlooked the fact that the New York Supreme Court of the first department reached a different conclusion in *Frey* v. *Torrey*, (70

App. Div. 166, affirmed by the Court of Appeals in a *per curiam* opinion, 175 N. Y. 501,) but so far as we know this is the only case that supports the construction given to section 17 by the Supreme Court of Illinois.

Why an ordinary claim for fraud should be released by the discharge, while a judgment for fraud is not released, is not altogether clear, although this distinction may have been created to avoid the necessity of going into conflicting evidence upon the subject of fraud; while in cases of judgments for frauds the judgment itself would be evidence of the fraudulent character of the claim. If a creditor has a claim against a debtor for goods sold which would ordinarily be covered by a discharge in bankruptcy, he is strongly tempted to allege, and if possible to prove, that the goods were purchased under a misrepresentation of the assets of the buyer, and thus to make out a claim for fraud which would not be discharged in bankruptcy. It was probably this contingency which induced Congress to enact that an alleged fraud of this kind should be reduced to judgment before it could be set up in bar of a discharge.

The intent of Congress in changing the language of the act of 1867 seems to have been to restore the act of 1841, which, as already observed, extended the benefits of the law to every debtor who had not been guilty of defalcation as a public officer or in a fiduciary capacity, the act of 1898 adding, however, to the excepted class those against whom a judgment for fraud had been obtained.

Some stress is laid by the Supreme Court of Illinois upon the punctuation of subdivision 4, section 17, presumably upon the insertion of a comma after the word "misappropriation," thereby indicating a severance of that which precedes from that which follows. While we do not deny that punctuation may shed some light upon the construction of a statute, (*Joy* v. *St. Louis*, 138 U. S. 1, 32,) we do not think it is entitled to weight in this case. In the enumeration of persons or things in acts of Congress it has been the custom for many years to insert a comma before the final "and" or "or" which precedes the last thing enumerated, apparently for greater precision, but without special significance. So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole. (*Doe* v. *Martin*, 4 J. R. 65; *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84; *United States* v. *Lacher*, 134 U. S. 624, 628; *United States* v. *Isham*, 17 Wall. 496.)

2. But it is strenuously insisted by the plaintiff that a claim for the conversion of personal property is not within the scope of section 17; because it is not a "provable debt" within the definition of section 63*a*. Did the latter section stand alone, there would be some ground for saying that a claim, though "founded upon an open account, or upon a contract, express or implied," would not be a provable debt, if plaintiff elected to treat the

conversion as fraudulent and sue in trover, though he might have chosen to waive the tort and bring an action for a balance due on account. An early English case, *Parker* v. *Crole*, (5 Bingham, 63,) is cited to the effect that the operation of the discharge is determined by the election of the creditor to sue in assumpsit or case. A like ruling was made in certain cases under the bankruptcy acts of 1841 and 1867. (*Williamson* v. *Dickens*, 27 N. C. 259; *Oliver* v. *Hughes*, 8 Penn. St. 426; *Bradner* v. *Strang*, 89 N. Y. 299–307.)

But we think that section 63*a*, defining provable debts, must be read in connection with section 17, limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the the bankrupt while acting as an officer, or in a fiduciary capacity. If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of a discharge? We are, therefore, of opinion that if a debt originates or is "founded upon an open account or upon a contract, express or implied," it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover as for a fraudulent conversion, instead of in assumpsit for a balance due upon an open account. It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63*a*. It results from the construction we have given the latter section that all debts originatiug upon an open account or upon a contract, express or implied, are provable, though plaintiff elect to bring his action for fraud.

In the case under consideration defendants purchased, under the instructions of the plaintiff, certain stocks and opened an account with him, charging him with commission and interest, and crediting him with amounts received as margins. Subsequently, and without the knowledge of the plaintiff, they sold these stocks, and thereby converted them to their own use. Without going into the details of the facts, it is evident that the plaintiff might have sued them in an action on contract, charging them with the money advanced and with the value of the stock; or in an action of trover based upon their conversion. For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy.

The judgment of the Supreme Court of Illinois is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.